152 U.S. 59

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RECORD, CASE No. 15,172.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1202.

W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK RICHARDS, AND D. C. GUERNSEY, AS MEMBERS OF THE BOARD OF HARBOR LINE COMMISSIONERS, AND ALLEN WIER, SECRETARY OF STATE, AND SAMUEL J. SMYTH, CLERK OF THE CITY OF TACOMA, APPELLANTS,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

FILED OCTOBER 17, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1892.

a UNITED STATES OF AMERICA, *ss:*

To the Northern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within sixty days from the date of this writ, pursuant to an appeal filed in the *the* office of the clerk of the circuit court of the United States for the district of Washington, wherein W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, as members of the board of harbor line commissioners, and Allen Wier, secretary, and Samuel J. Smyth, clerk of the city of Tacoma, are appellants and you are appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal United States Circuit Court, District of Washington.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of August, A. D. 1892, and of the Independence of the United States the one hundred and seventeenth.

C. H. HANFORD,
District Judge.

Attest: A. REEVES AYRES,
Clerk U. S. Circuit Court.

b [Endorsed:] In the U. S. Supreme Court. Northern Pacific Railroad Co. *vs.* W. F. Prosser *et al.* Citation.

TACOMA, WASHINGTON, *September 2nd*, 1892.

We hereby accept service of the within citation.

MITCHELL, ASHTON & CHAPMAN,
Attorneys for Appellees.

c In the Circuit Court of the United States for the District of Washington, Western Division, Feb-uary Term, 1892.

Be it remembered that on the 29th day of December, 1891, there was duly filed in said circuit court of the United States for the district of Washington, western division, a bill of complaint.

1 And afterwards, to wit, on Friday, the fourth day of March, 1892, at chambers of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

2 In the Circuit Court of the United States, Ninth Judicial Circuit, for the District of Washington, Western Division. Terms at Tacoma.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
W. F. PROSSER, EUGENE SEMPLE, H. F. Garretson, Frank Richards, and D. C. Guernsey, as Members of the Board of Harbor Line Commissioners, and Allen Weir, Secretary of State, and George Haskins, Clerk of the City of Tacoma, Defendants.

No. 111. Order Granting Preliminary Injunction.

Whereas in the above-entitled cause an application for the issuance of a preliminary writ of injunction was duly filed and set down for hearing before the Honorable C. H. Hanford, a judge of the above-entitled court, on the 1st day of February, 1892, at Tacoma, Washington, notice of such application being given to the above-named defendants; and the parties having appeared by their solicitors and having been heard upon such application, and it appearing that cause exists for the granting of a writ of injunction pending the final hearing of the cause, as prayed for—

It is, therefore, ordered that upon the complainant giving security, by bond, in the sum of twenty-five thousand dollars ($25,000), conditioned that the said complainant shall pay or cause to be paid all damages and costs which may accrue to the

3 said defendants by reason of the said injunction, a writ of injunction issue commanding, restraining, and enjoining the defendants W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, as members of the board of harbor line commissioners, and each of them from any further proceedings in locating or establishing or extending the harbor lines mentioned in the bill of complaint in said cause in the harbor of the city of Tacoma over the premises described in said bill or in such a manner as to embrace or include the same or any part thereof within the harbor lines of the city of Tacoma, and from any further proceedings in locating and establishing any water-way along in front of plaintiff's right of way as the same extends from Fifteenth street, in the city of Tacoma, to what is known as Brown's wharf, in said city, and restraining and enjoining the defendants Allen Weir, secretary of state, and George Haskins, clerk of the city of Tacoma, from filing any plat prepared by said harbor line commissioners showing the location of the harbor lines of the city of Tacoma over the premises described in said bill or in such a manner as to embrace or include the same or any part thereof within the harbor lines of the city of Tacoma or showing the location or establishment of the water-way along in front of the right of way of plaintiff extending from Fifteenth street, in the city of Tacoma, to what is known as Brown's wharf, in said city, until

the final hearing of said cause and until the further order of this court in the premises.

C. H. HANFORD, *Judge.*

Filed March 3rd, 1892.
—— ——, *Clerk.*

4 (Endorsement:) In the circuit court of U. S., district of Washington, western division, at Tacoma. Northern Pacific R. R. Co., plaintiff, *vs.* W. F. Prosser *et al.*, def'ts. Order granting preliminary injunction. Filed March 4th, 1892. A. Reeves Ayres, clerk. Mitchell, Ashton & Chapman, attorneys for pl'ff. Ent. Equity R. B., 55.

5 And afterwards, to wit, on the 27th day of May, 1892, there was duly filed in said court in said cause an amended bill of complaint in the words and figures as follows, to wit:

6 In the Circuit Court of the United States, Ninth Judicial *District*, for District of Washington, Western Division. Terms at Tacoma.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, *vs.* W. F. PROSSER, EUGENE SEMPLE, H. F. Garretson, Frank Richards, and D. C. Guernsey, Constituting the Harbor Line Commission of the State of Washington; George Haskin, City Clerk of the City of Tacoma, State of Washington, and —— Smythe, His Successor as City Clerk of said City, and Allen Weir, Secretary of State for the State of Washington, Defendants.	No. —. Amended and Supplemental Bill in Equity.

To the judges of the circuit court of the United States for the western division of the district of Washington, in the ninth judicial circuit:

The Northern Pacific Railroad Company, a corporation created and existing under the laws of the United States, brings this its amended and supplemental bill (leave of court having been
7 first obtained) against W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskin, city clerk of the city of Tacoma, State of Washington, and —— Smythe, his successor as city clerk of said city, and Allen Weir, secretary of state for the State of Washington, citizens of the State of Washington; and thereupon your orator complains and alleges—

First. That the plaintiff is a corporation duly created, organized, and existing under and by virtue of an act of Congress approved July 2nd, 1864, entitled "An act granting lands to aid in the con-

struction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts supplementary thereto and amendatory thereof.

Second. That by section 2 of said act there was and is granted to the said plaintiff a right of way in language as follows, to wit: "And *it be* further enacted, That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railway Company,' its successors and assigns, for the construction of a railroad and telegraph proposed, and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations."

8 Third. That by the first section of said act of Congress it is provided, among other things, as follows: "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges, and immunities, necessary to carry into effect the purposes of this act as herein set forth."

That by the fifth section of said act it was provided, among other things, as follows: "And be it further enacted, That said 'Northern Pacific railroad' shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform *guage* shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line."

That section 11 of said act provides as follows: "And be it

9 further enacted, That said 'Northern Pacific railroad,' or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

That by the 12th section of said act it was provided as follows: "And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States."

That also by said act there was granted to said plaintiff every alternate section of the public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States and ten alternate sections per mile on each side of said railroad whenever it passes through any State and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

10 That section 3 of said act by which said grant of lands is made states the object and purposes of said grant to be as follows: "For the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway."

That Congress also by said act reserved the right to at any time add to, alter, or amend or repeal said act, having due regard for the rights of plaintiff.

That section 20 of said act by which said reservation is made stated the objects and purposes of said reservation as follows: "That the better to accomplish the object of this act, namely to promot the public interests and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes."

That said act of Congress was amended by a subsequent joint resolution of Congress, approved May 31st, 1870, entitled "Resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road, and to secure the same by mortgage, and for other purposes."

That this resolution provided, among other things, the following: "And also to locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget sound, by way of the valley of the Columbia river, with the right to locate and

11 construct its branch from some convenient point on its main line across the Cascade mountains to Puget sound."

Fourth. That after the passage of said act and prior to March 9th, 1865, the plaintiff determined upon and selected the general route

of the main line of its road from Lake Superior to Puget sound, and of its branch by way of the Columbia river, to Portland, Oregon; that on the said 9th day of March, 1865, the plaintiff duly signed in writing, under its corporate seal, executed as required by the provisions of section 12 of this act, its acceptance of the terms, conditions, and impositions of said act, and thereupon caused the same to be served upon the President of the United States, and therewith presented and filed with the Secretary of the Interior, in the General Land Office of the United States, a map showing the general route of its main line from Lake Superior to Puget sound, with its branch, by way of the Columbia river, to Portland, Oregon; that the line designated upon the said map was by said map duly represented as the general route proposed by the plaintiff as its main line and branch line respectively between the points designated in said act of Congress.

Fifth. That the general route selected and determined by said company for its main line as aforesaid and the line of general route designated upon said map as the general route of its main line between the points mentioned in said act was located and run and was designated upon said map as being located and run by way of the valley of the Columbia river to Puget sound, and lay and was represented as lying north of the 45th degree of latitude, and said general route as so determined upon and selected and as designated by said map was on a line north of the 45th degree of lati-
12 tude as provided by said act; that said general route as so determined upon and selected and as designated by said map was and is the most eligible railroad route for the main line of said railroad and telegraph line from Lake Superior to Puget sound, and was at the time aforesaid selected and determined upon as such.

Sixth. That many years prior to November 11th, 1889, and while the State of Washington was still a Territory, plaintiff's main line of railroad and telegraph was constructed and fully completed in pursuance of the provisions of said act between the city of Portland, in the State of Oregon, and the city of Tacoma, in this State, and has been in operation and maintained by said plaintiff between said points ever since its completion continuously to the present time; that the said main line of road as so constructed and operated is by way of the valley of the Columbia river to Puget sound and upon and by way of the general route as selected and determined upon by the plaintiff in the year 1865 as aforesaid.

That said main line of said railroad of plaintiff as so constructed, completed, and operated in pursuance of said act extended and now extends to the eastern boundary line of what is known as the Tacoma Mill Company's property, at or near the cove which has been for years and now is used by said Mill Company as a log pond; which said point of termination of said line of railroad is situated upon Commencement bay, an arm or indentation of Admiralty inlet, near to and east of a point where the waters of Puget sound empty into or join the waters of said Admiralty inlet; which said

point of termination of said line of railroad is upon and within the harbor of the city of Tacoma.

13 That the red line drawn on the map hereto annexed and marked Exhibit "A" shows the main line of said railroad as the same extends from 15th street, in the said city of Tacoma, along the front of said city, to the point of termination aforesaid; that the green-colored space or width in the center of which said red line is located represents the right of way of said plaintiff, granted by said act of Congress, being two hundred feet in width on each side of the center of said main line; that at the time said act of Congress of July 2, 1864, was passed and approved all of the land over which said main line of said plaintiff's railroad now extends from 15th street, in the city of Tacoma, to the point of termination, at or near the waters of Puget sound, as aforesaid, were public lands of the United States, and all of the space included within 200 feet on either side of the said line between said points was a part of the public domain, subject to no rights save those of the United States and those at that date granted to this plaintiff by said act of Congress.

Seventh. That in addition to the lands and part of the public domain included within said right of way between said points the plaintiff is the owner in fee simple and entitled to and in the possession of all the land lying between the inner boundary line of said right of way and the platted portion of said city of Tacoma situated between Fifteenth street, in said city of Tacoma, and the point of termination of said line of railroad hereinbefore mentioned, and was such owner in fee simple of all of said land for many years prior to November 11, 1889, and has been such owner continuously ever since to the present time; that said land has not

14 nor has any part of it ever been platted into lots and blocks; that so much of said land as extends from South Seventh street to the eastern boundary line of the Tacoma Mill Company's property is more particularly bounded and described as follows:

"Beginning at a point where the west boundary line of the right of way of the Northern Pacific railroad (this line being west of and 200 feet distant from and parallel with the center of the main line of said railroad) intersects the north line of South Seventh street of the city of New Tacoma, Pierce county, Washington, thence running westerly on the north line of said South 7th street to its intersection with the east line of Pacific avenue, 150 feet, more or less; thence northwesterly on the east line of said Pacific avenue to a point on said east line 300 feet, more or less; thence westerly across Pacific avenue to a point where the north line of South Seventh street intersects the east line of Cliff avenue; thence in a general northerly and northwesterly course with the east line of Cliff avenue to the north line of E street, 4,110 feet, more or less; thence northwesterly on said north line of E street, opposite to block 3210, to the east line of said Cliff avenue, 213 feet, more or less; thence in a northerly and northwesterly course with the east line of Cliff avenue to a point diagonally opposite to the northerly corner of block 2804, 2,715 feet, more or less; thence northwesterly on a line coinciding with that part of said east line of Cliff avenue, opposite

to blocks 3604, 3704 and 3804, produced 541 feet more or less; to a point on the north line of section 32, town. 21 north, range 3 east, this point being 1,150 feet east of the northwest corner of said
15 section; thence east on the north line of said section to the southeast corner of the Tacoma Mill Company's property to its intersection with the west boundary line of the right of way of way of the northern Pacific railroad, 170 feet more or less; thence southerly and southeasterly, with said west boundary line of said right of way 200 feet distant from, and parallel with, the center of of the main line of the Northern Pacific railroad to the point of beginning, 7,600 feet, more or less, containing $37\frac{74}{100}$ acres, excepting therefrom Pacific avenue, being a strip of land containing $1\frac{40}{100}$ acres, more or less, and leaving $36\frac{34}{100}$ acres, more or less, all of the same being upon the harbor front of the city of Tacoma, in the county of Pierce, State of Washington."

Eighth. That said right of way abuts on the shore of Commencement bay and the line of high tide thereof, and the said above-described lands abut upon the said right of way and upon said shore and the line of high tide thereof; that the plaintiff is also the owner of the littoral and riparian rights, rights of access to deep water, and preference rights of purchase of the tide lands pertaining or belonging to the said lands; that said right of way and said lands are chiefly valuable for their right of access to deep water and the right to construct landings and warehouses upon the same northward and westward to the navigable waters of Commencement bay; that many years prior to November 11, 1889, plaintiff constructed and built upon the lands included within said right of way and westward and northward thereof into deep water and the navigable water of the said Commencement bay wharves,
16 upon which are constructed, in addition to the tracks, switches, turnouts, side-tracks, spur tracks, station buildings and freight-houses, and the other terminal facilities of its railroad; also warehouses for the accommodation of general commerce and shipping by water, coal bunkers for the accommodation of loading coal into ships and to facilitate the shipment thereof by water, wheat warehouses and grain elevators for the accommodation of the loading of ships with wheat and other grain, and to facilitate the shipment thereof by water; all of which were constructed for the accommodation of commerce and for the loading of ships and to facilitate navigation and all classes of shipment by water, and ever since has continuously maintained and does now maintain and use the same for the benefit of trade, commerce, and navigation; that the land hereinbefore described is situated between said plaintiff's right of way and the platted portion of the city of Tacoma, and consists of a high, steep, abrupt bluff, over or across which a railroad could not be properly or safely built; that a railroad built over or across the same would not be practicable to operate so as to reach out and connect with the shipping by water on Commencement bay; that the space included within the right-of-way limits designated upon the map hereto attached is the only space between the said bluff and the waters of Commencement bay upon

which the tracks, station buildings, and terminal facilities of said plaintiff's railroad could be located and the only space within the city of Tacoma where said plaintiff could establish such facilities as are necessary to make possible and facilitate trans-hipment from rail to vessel and from vessel to rail;

17 that the general warehouses, coal bunkers, and wheat and grain warehouses built and constructed along said harbor front upon and extending outward from said right of way and said abutting lands are also necessary adjuncts to the proper operating of said railroad and necessary to aid in and facilitate the said tran'-shipment from rail to vessel and from vessel to rail; that the map hereto attached marked Exhibit "A" shows said warehouses and coal bunkers and the wharves on which they are constructed or of which they are a part, as well as the passenger depots, freight-houses, station buildings, and other terminal facilities of said plaintiff's railroad, including main track, side track, turnouts, switches, and spur tracks, and all other facilities which were found necessary to be constructed upon and along said water front in the operation of said plaintiff's business as a common carrier; that the point on Commencement bay, where the plaintiff's line of railroad first reaches a place on the harbor front of the city of Tacoma, where tran-shipment can be made from rail to vessel and from vessel to rail is at a place on plaintiff's line about opposite South Second street or a point which would be intersected by South Second street extended; that said point is about the first point reached on the line of plaintiff's railroad going westward towards the waters of Puget sound where water can be found of sufficient depth to accommodate the navigation of deep-water vessels, and that all of the space included within said right of way of plaintiff between said point and the point of termination of said plaintiff's line is required for the accommodation of the terminal facilities necessary in the use and operation of plaintiff's said railroad.

18 That the said buildings, warehouses, and other facilities were constructed at an expense of several millions of dollars; that ever since said wharves, warehouses, buildings, and other facilities were so built and constructed they have been maintained and used for the purpose of trade, commerce, and business, and to aid and facilitate navigation as well as the operation of plaintiff's railroad; that the same have ever since the first construction thereof been of great benefit and assistance in building up the business and commerce of the city of Tacoma, as well as that of the entire State of Washington, and have been a source of revenue and profit to the plaintiff; that without them the plaintiff could not have performed the public services which under said act of Congress are imposed on it and could not have successfully or properly carried on the public business delegated to it by said act of Congress; that for the public welfare and for the proper establishment and maintenance of commerce and navigation it was and is necessary that these facilities, buildings, wharves, warehouses, should be constructed and maintained upon and along said water front and should be used and

continue to be used by plaintiff in connection with the operation of its said railroad.

That when plaintiff's line of railroad was originally constructed along the harbor front in the city of Tacoma, ready for operation, so much of it as extended over lands lying below or outside of the line of extreme high tide was built upon trestles constructed upon piles driven for the support thereof; that all the spurs, side tracks, switches, turnouts, buildings, wharves, warehouses, and other
19 improvements built out over or extending upon lands lying below or outside of the line of extreme high tide were upon said trestles constructed as aforesaid; that all of the space covered by such portions of said line of road, tracks, buildings, and improvements extending between South 15th street and what is known as Brown's wharf has been since the original construction of said lines of road and was long prior to November 11, 1889, the date when said Territory of Washington was admitted as a State of the Union by the adoption of the State constitution, filled in with earth, rock, and gravel and made firm, solid ground, the said tracks, buildings, and other improvements and facilities resting thereon and being supported thereby, instead of upon the piling and trestles which were removed at the time of the making of said solid ground; that the work of filling in and replacing said trestles and piling has provided and furnished for the occupation, operation, and maintenance of said line of railroad a continuous line of solid ground from South 15th St. to a point where navigation available for water craft and vessels generally is first reached by said line of railroad.

That the upland abutting upon the waters of said Tacoma harbor and the approaches from the land down to the water were so steep and abrupt that in order to reach, with the line of said road, the navigable waters of said harbor or of Puget sound, at said place, available for the navigation of vessels and water craft generally, it became and was necessary to construct the line of plaintiff's road in most places along said water front below the line of extreme high tide and in many places below the line of ordinary high tide,
20 and to make the construction, operation, and maintenance of said line of railroad practicable for the reaching of deep-water navigation, said line of railroad was constructed along said harbor.

That, owing to the necessity for the speedy completion of said line of road, to make it ready for operation, it was not possible to do the work of filling in and the making of solid ground along the line of said road upon the water front at or before the time of the original construction of said road, but after said road had been in operation for some years it became necessary for the proper and convenient operation of its line along said water front that said piling and trestles by which it was supported and over which it extended should be replaced by solid, firm ground at all points along said water front where it was possible to carry on or accomplish the work of filling in; that for the greater part of the distance over which the line of plaintiff's road extends to the northward and westward of Brown's wharf the said line of road, as well as most of

the side tracks, spurs, switches, turnouts, platforms, stations, wharves, buildings, and other improvements are built upon trestles supported by piles driven for that purpose; that for the greater part of said distance said line of road and most of said improvements and facilities are beyond, below, and outside of the line of extreme high tide, and at many points and places said line of railroad and many of the improve- and facilities are below, beyond, and outside of the line of ordinary high tide; that in many places along within said distance where the main line of said railroad and the center line of said right of way is not outside of, below, or beyond the line of
21 ordinary high tide many of the proper and necessary facilities and improvements necessary for use in connection with the operation of said line of railroad, are situated outside of, beyond, and below the line of ordinary high tide, such as side tracks, spurs, switches, wharves, warehouses, coal bunkers, and elevators, for which there is no available space possible to be obtained between the center line of the main track of said railroad and the shore along the steep and abrupt bluff of the upland, and which, in order to be adapted to their use, must be located on the side of the main track next to the sea or waters available for navigation; that plaintiff's said line of railroad along said harbor front and the facilities and improvements built upon and along on either side thereof and in use in connection therewith are constructed in such a connected way as to form a continuous line of improvements at all points along said water front, extending outward from the land to available navigation, and so connected with improvements upon the land abutting on the shore as to become a part thereof and in the nature of an extension therefrom and in such a way as not to be or become an obstruction or hindrance to navigation and so as not to interfere with navigation in any way whatever, but are so constructed that they can be and are used and are at all times available for use in aid of both commerce and navigation.

That all of the tracks, buildings, structures, and facilities constructed and in use in connection with the operation of said line of railroad along said water front are located and constructed within the limits of said plaintiff's right of way, even where they extend beyond and outside of the line of ordinary high tide, except small portions of the outer ends of some of the coal bunkers, wharves, and docks, which, in order to make them available for the
22 peculiar use to which they are designed, are extended beyond the outer boundary line of the right of way, but only to such an extent as will make them available for their use and to no further distance or extent and without forming any obstruction or hindrance to navigation.

Ninth. Under and by virtue of said act of Congress the said plaintiff's right of way hereinbefore described as situated along the harbor front of the city of Tacoma is the property of the plaintiff for the uses and purposes designated in said act, and is not subject, nor any part of it, to the rights or uses of any other corporation, State, municipal, or private, or of any individual, so long as the plaintiff so continues to use it for railroad purposes in accordance

with said act of Congress, and that so long as plaintiff so uses it for such purposes it is entitled to the exclusive possession and use thereof, and the same is not subject to be taken or to be seized by the State of Washington or any persons acting by, through, or under the authority of said State of Washington.

Tenth. That under and by virtue of an act of the legislature of the State of Washington approved March 26th, 1890, entitled "An act for the appraising and disposing of the tide and other lands belonging to the State of Washington," said plaintiff is entitled to the exclusive right for sixty days following the final appraisement of tide lands in front of the city of Tacoma to purchase the lands so improved by the construction of said wharves, warehouses, and other improvements, and the said plaintiff desires to and intends to avail itself of said exclusive right of purchase as to all lands covered
23 by any portion of said improvements which extend beyond and outside of the limits of said right of way as well as of all the tide lands over which plaintiff has littoral or riparian rights by reason of the ownership of the uplands and right of way abutting thereon, as hereinbefore set forth.

Eleventh. That under and by virtue of the act of the legislature of the State of Washington approved March 28th, 1890, entitled "An act to create a board of harbor line commissioners," and prescribing their duties and compensation, the governor of the State appointed as such commissioners the defendants W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey; that the members of said harbor line commission have duly qualified as such and entered upon the discharge of their duties as such commissioners and are about to take final action in the location and establishment of the harbor lines within the limits of the city of Tacoma, and that, as plaintiff is informed and believes, said commission proposes and are about to locate and establish such harbor lines in such a way as to include within such harbor lines a part or the whole of the improvements of the plaintiff hereinbefore mentioned, including a portion of the plaintiff's right of way and the wharves, tracks, stations, and other terminal facilities located thereon; that the extension of the harbor lines over said improvements is an attempt of the board on the part of the said harbor line commission to exercise unauthorized power and to do an act which is not within the jurisdiction of said harbor line commission; that said harbor line commission has not authority or jurisdiction under the laws of the State of Washington, as plaintiff is informed and
24 believes, to embrace or include within the harbor lines to be located and established in front of the city of Tacoma the wharves, coal bunkers, docks, warehouses, and other improvements made thereon; that if the harbor line commission aforesaid is not prevented by a writ of injunction from this honorable court from extending the so-called harbor lines over the wharves, warehouses, and other improvements of the said plaintiff the said commission will so extend said lines and thus deprive the said plaintiff of the use and benefit of its said wharves, warehouses, tracks, stations, and other terminal facilities, including a portion of the plaintiff's right

of way, without any compensation therefor and without due process of law or process of law whatsoever, and will thus cloud plaintiff's title to the same in such a manner as greatly to embarrass and hinder plaintiff in the legitimate use of its said property.

Twelfth. That the possession which the plaintiff now has of the tide lands in front of the lands hereinbefore described is a valuable right to it, and the preference right which the said plaintiff has under the laws of the State of Washington for the purchase of the tide lands, upon which are situate valuable improvements, as hereinbefore stated, (is a vested right) and of great value to the plaintiff.

Thirteenth. That the defendants above named, the members of the harbor line commission, in threatening to locate the said harbor lines over the said property and improvements of the plaintiff, are acting entirely without warrant of law and are acting and threatening to act entirely beyond the scope of their authority and are
25 transcending and threatening to transcend the authority conferred upon them as said harbor line commissioners by the said act of the legislature of the State of Washington.

That the said defendant commissioners, in so acting and so threatening to act, are assuming powers over the property and improvements of the plaintiff which are not vested in defendants by law, and are infringing and threatening to infringe upon the vested rights of the plaintiff without warrant or authority of law.

Fourteenth. That the above-named defendants, the members of the harbor line commission, are threatening to and are about to locate and establish along in front of plaintiff's right of way where the same extends between *the* 15th street and what is known as Brown's wharf, in the city of Tacoma, a water-way; that the said defendants, the members of said harbor line commission, in the location and establishing of said water-way, claim to be acting in the exercise of authority which they claim to have been conferred upon them by an act of the legislature of the State of Washington approved March 28, 1890, entitled "An act to establish and define public ways for water crafts across the tide flats within, in front of, and for a mile either way from all incorporated cities and towns in the State of Washington."

That section 2 of said act provides as follows:

"SEC. 2. The public ways provided for in section one of this act shall not be less than fifty nor more than one thousand feet wide and shall commence at the outer or deep-water end, in not less than twenty feet of water at low tide, and shall extend inland across the State's tide lands."

That there is not at low tide as much as twenty feet in depth in front of or beyond plaintiff's right of way from 15th street to said Brown's wharf, and, as plaintiff is informed and believes, it
26 is the purpose and determination of said defendants, the members of said harbor line commission, to establish and locate the commencement or outer or deep-water end of said water-way at some point between said Brown's wharf and said 15th street, but at what place between said points the said outer end is to be es-

tablished plaintiff has not any accurate or definite knowledge or information (except that it may be inferred from the lines designated on the maps prepared by the commissioners that said water-way will commence at or about a point opposite the south and east line of said Brown's wharf); that for several years continuously prior hereto the work of filling in with earth, gravel, rock, brush, and other material of that portion of plaintiff's right of way between 15th street and Brown's wharf which extended over land where the tide ebbed and flowed has been going on, and said work was completed prior to the time when said harbor line commission first commenced operations or gave any attention to the consideration of harbor lines or water-ways within the harbor of the city of Tacoma; that the entire width of said right of way between 15th street and said Brown's wharf has been solidly filled with earth and is now and has for a long time been solid, firm, and permanent ground, over which the tides do not ebb or flow; that for the maintaining and perfecting of the ground so filled in within the limits of said right of way between the points aforesaid and for the accommodation of landing places and warehouses a space lying adjacent and in front of said right of way between said points was also filled in solidly and made firm, substantial, and permanent ground; that said space extending out from and running along in front of said right of way is of varying width, but so filled in as
27 not to be an obstruction to navigation, but constituting a facility for and is in aid of navigation; that said water-way, if so established, will seriously and injuriously interfere with the proper use of said plaintiff's right of way and the improvements thereon and, extending outward therefrom, destroy the convenient and proper access to said right of way and the said improvements; that the said members of said harbor line commission in the location and establishment of said water-way as proposed are acting without authority of law and in violation of the property rights of this plaintiff; that upon the outer line of the space filled in outside of the right of way extending between 15th street and Brown's wharf, as in this paragraph set forth, plaintiff built a sea wall adapted in all respects, both as to height and depth and method of construction, for the making and operation of a deep-water channel outside of the same of a depth of between 30 and 40 feet; that at the time said filling in was done and said sea wall constructed there was no channel south or east of said Brown's wharf having any depth of water sufficient for purposes of navigation or of sufficient width to be available for practical use, and all the lands lying to the northward of such channel as there was between 15th street and Brown's wharf and on the outside of said sea wall were mud flats or tide lands, which were entirely bare at low tide, and the waters flowing over same were not, and are not now, navigable for vessels at any stage of the tide, and never were.

Fifteenth. That the said defendants, The Harbor Line Commissioners, have made and prepared a plat showing the location by them of said harbor lines and of said water-ways within the limits

of the city of Tacoma; that said plat, if filed, will consist of
28 several maps showing said harbor lines or areas as the same
are situated along the various portions of the water front of
said city.

That the map hereto attached marked "Exhibit B" is a copy or blue print of one of the maps intended by said harbor line commissioners to be made a part of said plat and is intended to show so much of said harbor lines or harbor area intended or about to be located and established by said commission as extends from the west line of the Tacoma Mill Company's plant to the east line of Brown's wharf or the west line of South Fourth street extended, and said map also shows so much of the harbor lines and harbor area, 150 feet in width, as extend- from the west line of South Fourth street to the west line of South Seventh street extended, said last-mentioned harbor lines and harbor area being intended and designed by said commission to be located and established upon, along, and over and covering and including within their limits the grounds filled in between the outer line of plaintiff's right of way and the sea wall constructed by plaintiff as aforesaid, where there were not at the time of the preparation of said maps and are not now any navigable waters or any waters of any kind at any stage of the tide, but solid, firm ground over the entire portion of the limits of said area and between said lines; that it is the intention and design of said harbor line commissioners to locate and establish said harbor lines and harbor area along the water front of Tacoma between said west line of the Tacoma Mill Company's property and said east line of Brown's wharf as
aforesaid, as designated upon said map, and so that the said
29 area shall extend 400 feet inward from the outside line designated upon said map; that all parts or portions of plaintiff's facilities, improvements, tracks, buildings, and structures which are situated or extend outside of and beyond the line of ordinary high tide (where said tide line is outside of the meander line and not more than 400 feet distant inward from the outer line designated on said map) are included within said harbor area or harbor lines, and the said harbor lines as intended to be located and established and as will be located and established by said commissioners if said map is allowed to be filed will extend over said improvements, right of way, facilities, tracks, buildings, and structures, and the said location made by said commissioners will include and cover many of plaintiff's most valuable improvements and a large part of the right of way on which the same are situated.

That the map hereto attached marked "Exhibit C" is a copy or blue print of one of the maps prepared by said commissioners and intended to be made a part of the plat about to be filed by said commissioners as a part of the process of locating and establishing the harbor lines and harbor areas upon the water front of the city of Tacoma; that it is intended by said commissioners, and it is their design, to locate, and they are about to locate and establish, harbor lines and harbor areas, as designated upon said map, extending from the east line of South 7th street extended to the east line

of South 12th street extended; that the lines are so drawn and located as to provide for a harbor area 150 feet in width (including within their limits all of the space filled in between
30 the outer line of plaintiff's right of way and said sea wall) extending from South 7th street to South 12th street, and also harbor lines are designated upon said map as intended to be located and established by said commissioners extending seaward and at right angles from the lines and area above mentioned where the same ends at South 12th street, said lines extending seaward 600 feet and so drawn as to provide for a harbor area of 150 feet in width and connecting at their outer ends with harbor lines and a harbor area extending from South 12th street to South 7th St. and running parallel with the harbor area located between plaintiff's right of way and sea wall, said outer harbor lines or outer harbor area being 600 feet uniformly to the seaward from said inner harbor lines or area. Said map also represents a water-way designed to be located and established by said commissioners extending as far south and east as to the east line of South 23rd street, but the initial point of which to the seaward cannot be ascertained from any inspection of the maps or plats of said commission or from any information which plaintiff has been able to obtain, but so far as plaintiff is able to ascertain from such information as it has obtained it is plaintiff's belief that it is intended and designed by said commission to establish said water-way between South 12th street and South 23d street, with a probable extension of the same seaward from South 12th street to a point about opposite the east line of Brown's wharf.

That the map hereto attached marked "Exhibit D" is a copy or blue print of one of the maps intended by said commissioners to be made a part of the plat to be filed as a plat of the harbor lines of the city of Tacoma; that said map shows so much of the
31 harbor lines and areas as extends from the east line of Brown's wharf to South Seventh street, and also the lines and area running parallel therewith and 600 feet distant therefrom, and also the lines extending at right angles to said parallel lines, at the ends thereof next opposite said Brown's wharf, and extending across the front of Commencement bay and extending northward and seaward and at right angles from the lines and areas running along the shore front, said lines including within their limits an area of 600 feet in width.

That the map hereto attached, marked "Exhibit E," is a copy or blue print of one of the maps intended and designed by said commissioners to be made a part of the plat to be filed as a part of the location and establishment of the harbor lines of the harbor of Tacoma and shows the lines and harbor area extending from the west line of the Tacoma Mill Company's property westward along the water front of the city of Tacoma.

That the map hereto attached, marked "Exhibit F," is a copy or blue print of one of the maps intended by said commissioners to be made a part of the plat to be filed, as aforesaid, and there is desig-

nated upon it the extension of the lines and area described or marked out upon "Exhibit E."

That the maps hereto attached, marked, respectively, "Exhibits G, H, and I," are copies or blue prints of similar maps, showing other portions of the harbor lines and areas intended to be located and established by the filing of the plat mentioned in this bill.

That a plat containing the lines and areas designated upon said maps has been made and prepared by said defendants The
32 Harbor Line Commissioners, and they now threaten to file said plat in the office of the defendant, Allen Weir, said secretary of state, and in the office of said George Haskin, the said clerk of the city of Tacoma (and who, since the filing of the original bill herein, has been succeeded in the office of clerk of the city of Tacoma by —— Smythe, who is now the qualified and acting clerk of said city), and said plaintiff fears, unless restrained by the order of this honorable court, that the said commissioners will so offer said plat for filing, and that said George Haskin, the said clerk of said city of Tacoma (or the said —— Smythe, as his successor), and the said defendant, Allen Weir, said secretary of state, will so file said plat.

Sixteenth. That at the time the original bill herein was filed this plaintiff did not know and could get no definite information concerning the exact nature of the plat which the defendants The Harbor Line Commissioners threatened and were about to file, except that the plaintiff ascertained that the plat which said commissioners were about to file had designated thereon harbor lines and harbor areas which covered and included within their limits many of the buildings, structures, and valuable improvements and a large part of the right of way of plaintiff situated along the water front of the city of Tacoma.

That previous to the commencement of this action, and at the time of the filing of the original bill herein, the said defendants, The Harbor Line Commissioners, and the officers and representatives of the board which they constituted declined and refused to show plaintiff, or any one representing it, the said plat about to be
33 filed or any of the maps constituting the same, and refused to permit or allow plaintiff, or any one representing it, to make an inspection of the same or to obtain any copy thereof, and no one representing plaintiff had any opportunity to examine said plat or said maps or to know or ascertain anything about the same until after the original bill was filed herein, and the restraining order of the court had been issued and served, and plaintiff was therefore unable to allege in its original bill the precise nature of said maps or plat or to allege anything definite concerning the same.

Seventeenth. That the said threatened acts of the said harbor line commissioners and the said city clerk and the said secretary of state

if carried out will work great, lasting, and irreparable damage and injury to the plaintiff, which damages and injury are not susceptible of compensation in damages; that the plaintiff has no plain, adequate, or speedy remedy at law, and has no adequate remedy in the premises except by the issuance of a writ of injunction by this honorable court; that there is danger that unless the said defendants are restrained from the doing of their said threatened unlawful acts pending the determination of the plaintiff's application for an injunction great and irreparable injury will result to the plaintiff.

To the end, therefore, that said harbor line commissioners, to wit, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, and the said George Haskin, clerk of the city of Tacoma (and his successor in office, —— Smythe), and said Allen Weir, secretary of state for the State of Washington, may
34 full, true, direct, and perfect answer make according to the best of their knowledge, information, and belief to all and singular the matters and charges aforesaid, your orator hereby waiving the necessity of the answer of the defendants or of any of them being put in under oath of any of said defendants, and that as fully and particularly in every respect as if the same were here again repeated and the said defendants and each of them thereunto particularly interrogated, and that your orator may have it adjudged and decreed that a writ of injunction of this honorable court shall issue to the said harbor line commissioners, to wit, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guersney, and to the said George Haskin, clerk of the city of Tacoma (and his successor in said office, —— Smythe), and to the said Allen Weir, secretary of state as aforesaid, and to each of them, enjoining and restraining the said commissioners and each of them from extending, locating, or establishing the harbor lines in front of the city of Tacoma or in the harbor of the city of Tacoma over any of the wharves, warehouses, tracks, stations, or other terminal facilities included within any portion of a strip two hundred feet in width on either side of plaintiff's main line of railroad, as the same runs along the harbor front of the city of Tacoma from Fifteenth street, in said city, northwardly and westwardly to the cove used as a log pond or log-dumping ground by the Tacoma Mill Company at the western boundary line of the land described in this bill, and from extending, locating, or establishing said lines over any portion of the said width of two hundred feet on either side of said main line of
35 track, as the same runs along said harbor front as aforesaid; also from extending, locating, or establishing such harbor lines over any of plaintiff's wharves or its other facilities of navigation or commerce extending out from or in front of said strip or the adjacent upland in said bill described, and from locating or establishing any water-ways upon, along, or over or in front of any portion of said width of two hundred feet on either side of the center of the main line of plaintiff's railroad where the same runs along said harbor front from Fifteenth street in a northwardly and westwardly

direction to the structure known as "Brown's wharf," in said city of Tacoma;

And enjoining and restraining the said George Haskin, city clerk of said city of Tacoma (and his successor in said office, —— Smythe), and the said Allen Weir, secretary of state for the State of Washington, from receiving and filing any plat or map showing the location of said harbor lines in front of or within the harbor of the city of Tacoma over any of the wharves warehouses, tracks, stations, or other terminal facilities included within a width of two hundred feet on either side of the center of said plaintiff's main line of railroad along the harbor front of said city of Tacoma or extending out from or in front of said width, or any map or plat showing the said harbor lines over any portion of said width or showing the location of any water-way upon, along, over, or in front of said width of two hundred feet upon either side of the center of the main line of plaintiff's railroad where the same extends from Fifteenth street to Brown's wharf;

36 And that pending the hearing of the plaintiff's application for the said order directing the issuance of said injunction your orator may have granted an order restraining the defendants, the said Harbor Line Commissioners, and each of them, from so extending, locating, or establishing the harbor lines in front of the city of Tacoma over any of the wharves, warehouses, tracks, stations, or other terminal facilities included within any portion of a strip two hundred feet in width on either side of plaintiff's main line of railroad, as the same runs along the harbor front of the city of Tacoma from Fifteenh street, in said city, northwardly and westwardly to the cove used as a log pond or log-dumping ground by the Tacoma Mill Company, at the western boundary line of the land described in this bill;

Also from extending, locating, or establishing said lines over any portion of the said width of two hundred feet on either side of said main line of tract, as the same runs along said harbor front as aforesaid;

Also from extending, locating, or establishing such harbor lines over any of plaintiff's wharves or its other facilities of navigation or commerce extending out from or in front of said strip or the adjoining upland in said bill described;

And from locating or establishing any water-ways upon, along, over, or in front of any portion of said width of two hundred feet on either side of the center of the main line of plaintiffs railroad where the same runs along said harbor front from Fifteenth street in a northwardly and westwardly direction to the structure known as Brown's wharf, in said city of Tacoma;

37 And enjoining and restraining the said George Haskin, city clerk of said city of Tacoma (and his successors in said office, —— Smythe), and the said Allen Weir, secretary of state of

the State of Washington, from receiving or filing any plat or map showing the location of said harbor lines in front of or within the harbor of the city of Tacoma over any of the wharves, warehouses, tracks, stations, or other terminal facilities included within a width of two hundred feet on either side of the center of said plaintiff's main line of railroad along the harbor front of said city of Tacoma, or extending out from or in front of said width, or any map showing the said harbor lines over any portion of said width or showing the location of any water-way upon, along, over, or in front of said width of two hundred feet upon either side of the center of the main line of plaintiff's railroad where the same extends from Fifteenth street to Brown's wharf;

And that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet—

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, directed to the said W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commissioners of the State of Washington, and George Haskins, city clerk of the city of Tacoma, (and his successors in said office, —— Smythe), and Allen Weir, secretary of state for the State of Washington, commanding them and each of them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such
38 order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

MITCHELL, ASHTON & CHAPMAN AND
ANDREW F. BURLEIGH,
Solicitors and Counsel for Plaintiff.

[Endorsement:] No. —. In circuit court of U. S., district of Washington, western division, at Tacoma. Northern Pacific R. R. Co., pl'ff, *vs.* W. F. Prosser *et al.*, Harbor Line Com's'rs, *et al.*, def'ts. Amended and supplemental bill. Filed May 27th, 1892. A. Reeves Ayers, clerk. Mitchell, Ashton & Chapman and Andrew F. Burleigh, solicitors for pl'ff.

39 And, afterwards, to-wit, on the 27th day of May, 1892, there was duly filed in said court in said cause a demurrer to the amended bill of complaint in the words and figures as follows, to-wit:

40 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, Terms at Tacoma. In Equity.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, Frank Richards, and D. C. Guernsey, Constituting the Harbor Line Commission of the State of Washington; George Haskins, City Clerk of the City of Tacoma, State of Washington, and —— Smythe, His Successor as City Clerk of said City, and Allen Weir, Secretary of State for the State of Washington, Defendants.

No. —. Demurrer.

The demurrer of the above-named defendants, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskin, city clerk of the city of Tacoma, State of Washington, and Allen Weir, secretary of state for the State of Washington, to the amended & supplemental bill of complaint of the above-named plaintiff.

41 These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill and for cause of demurrer show:

First. That it appeareth by the plaintiff's own showing by the said bill that plaintiff is not entitled to the relief prayed by said bill against these defendants nor any part thereof nor against any of these defendants.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants do demur thereto; and defendants pray the judgment of this honorable court whether they shall be compelled to make any answer to the said bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

W. C. JONES,
Att'y Gen'l, Solicitor, and of Counsel for Above-Named Defendants, Spokane, Washington.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

W. C. JONES,
Att'y Gen'l State of Washington.

42 STATE OF WASHINGTON, } ss:
County of Pierce. }

H. F. Garretson, being duly sworn, deposes and says: I am one of the above-named defendants. The foregoing demurrer is not interposed for delay.

H. F. GARRETSON.

Subscribed and sworn to before me this 27th day of May, 1892.

A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington.

(Endorsement:) U. S. circuit court. N. P. R. R. Co., plaintiff, *vs.* Wm. F. Prosser *et al.*, defendant-. Demurrer. Filed May 27th, 1892. A. Reeves Ayres, clerk. W. C. Jones, attorney for def'ts.

43 And afterwards, to wit, on Friday, the 27th day of May, 1892, the same being a judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

44 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, Terms at Tacoma.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK RICHards, and D. C. Guernsey, Constituting the Harbor Line Commission of the State of Washington; George Haskin, City Clerk of the City of Tacoma, State of Washington, and —— Smythe, His Successor as City Clerk of said City, and Allen Weir, Secretary of State for the State of Washington, Defendants.

Now, on this day, this cause coming on to be heard upon the amended and supplemental bill of the plaintiff and the demurrer thereto filed by the defendants, the plaintiff appearing by Mitchell, Ashton & Chapman, Esqs., and Allen & McBride, Esqs., and the defendants appearing by W. C. Jones, Esq., attorney general of the State of Washington, and the court being fully advised in the premises, it is considered and ordered that said demurrer be, and the same is hereby, overruled, and the defendants thereupon stand upon their said demurrer and refuse to plead further.

45 Whereupon, upon motion of plaintiff's attorneys, it is considered, adjudged, and decreed that the defendants and each of them be restrained from filing or causing to be filed the plat locating the harbor line in front of the city of Tacoma, as set forth in said supplemental and amended bill, and the restraining order

heretofore issued out of this court in the above-entitled cause is hereby continued in full force and effect.

Dated this 27th day of May, 1892.

C. H. HANFORD,
District Judge.

(Endorsement:) U. S. circuit court. Northern Pacific Railroad Co., plaintiffs, *vs.* W. F. Prosser *et al.*, defendant-. Order on demurrer to amended bill. Filed May 27th, 1892. A. Reeves Ayres, clerk. E. R. B. E., 62.

46 And afterwards, to wit, on the 27th day of May, 1892, there was duly filed in said court in said cause a notice of appeal in the words and figures as follows, to wit:

47 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, Terms at Tacoma.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK Richards, and D. C. Guernsey, Constituting the Harbor Line Commission of the State of Washington; George Haskins, City Clerk of the City of Tacoma, State of Washington, and —— Smythe, His Successor as City Clerk of said City, and Allen Weir, Secretary of State for the State of Washington, Defendants.

The above-named defendants, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskins, city clerk of the city of Tacoma, State of Washington, and —— Smythe, his successor as city clerk of said city, and Allen Weir, secretary of state for the State of Washington, conceiving themselves aggrieved by the order and decree entered herein on the 27th day of May, 1892, do hereby appeal from said order to
48 the Supreme Court of the United States, and they pray that this their appeal may be allowed and that a transcript of the records and proceedings upon which said order was made may be sent to the Supreme Court of the United States.

——, ——,
Attorney General of the State of Washington,
Attorney and Counselor for Defendants.

And now, on, to wit, the 27th day of May, 1892, the above application of the defendants is allowed in open court, Allen & McBride, Esqs., attorneys, appearing for the plaintiff, and the bond on such appeal is hereby fixed at one thousand dollars.

C. H. HANFORD,
District Judge.

(Endorsement:) U. S. circuit court. Northern Pacific Railroad Co., plaintiff, *vs.* W. F. Prosser *et al.*, defendant-. Order on appeal. Filed May 27th, 1892. A. Reeves Ayres, clerk.

49 And afterwards, to wit, on the 5th day of July, 1892, there was duly filed in said court in said cause an assignment of errors in the words and figures as follows, to wit:

50 In the Supreme Court of the United States of America.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK Richards, and D. C. Guernsey, Constituting the Harbor Line Commission of the State of Washington; George Haskin, City Clerk of the City of Tacoma, State of Washington, and —— Smythe, His Successor as City Clerk of said City, and Allen Weir, Secretary of State for the State of Washington, Defendants.

In the matter of the petition of the defendants W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskin, city clerk of the city of Tacoma, State of Washington, and —— Smythe, his successor as city clerk of said city, and Allen Weir, secretary of state for the State of Washington, appellants.

Assignment of Errors.

Afterwards, to wit, on the second Monday of September, in the year of our Lord eighteen hundred and ninety-two, at the October term for 1892 of the Supreme Court of the United States, at
51 the Capitol, in the city of Washington and District of Columbia, come the said W. F. Prosser, Eugene Semple. H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskin, city clerk of the city of Tacoma, State of Washington, and —— Smythe, his successor as city clerk of said city, and Allen Weir, secretary of state for the State of Washington, by W. C. Jones, attorney general of the State of Washington, and William Lair Hill, Esq., their attorneys, and say that in the records and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. That the matters charged in the bill of complaint against said appellants do not constitute any cause of action or ground for relief by the common law or any statute of the United States or of the State of Washington.

Second. That the court erred in overruling the demurrer of defendants to plaintiff's bill of complaint.

Third. That the court erred in granting and continuing the restraining order against the said defendants at the suit of the plaintiff.

Wherefore the said W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskin, city clerk of the city of Tacoma, State of Washington, and —— Smythe, his successor as city clerk of said city, and Allen Weir, secretary of state for the State of Washington, pray that the order of the said circuit court of the United States for the western division of
52 the district of Washington, for the ninth judicial circuit, be reversed, and the said circuit court of the United States for the western division of the district of Washington be ordered to enter an order directing that the demurrer of the defendants to plaintiff's bill of complaint be sustained, and that the said bill of complaint be dismissed and the restraining orders and injunctions heretofore issued out of said court be dissolved and held for naught.

WILLIAM LAIR HILL.
W. C. JONES,
Attorney General for the State of Washington, and
WILLIAM LAIR HILL,
Attorneys for Defendants and Appellants.

(Endorsement:) N. P. R. R. *v.* Harbor Line Com's'rs. Assignment of errors. Orig. Filed July 5, 1892. A. Reeves Ayres, clerk.

53 And afterwards, to wit, on the 27th day of July, 1892, there was duly filed in said court in said cause a bond on appeal in the words and figures as follows, to wit:

54 In the Circuit Court of the United States, Ninth Judicial Circuit, for the District of Washington, Western Division, at Tacoma.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
WM. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK H. Richards, and D. C. Guernsey, Constituting the Harbor Line Commission of the State of Washington; S. J. Smythe, City Clerk of the City of Tacoma, and Allen Weir, Secretary of State for the State of Washington, Defendants.

Know all men by these presents that we, Wm. F. Prosser, Eugene Semple, H. F. Garretson, Frank H. Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; S. J. Smythe, city clerk of the city of Tacoma, and Allen Weir, secretary of state for the State of Washington, as principals, and R. W. Derickson and W. G. Rowland, as surety, are held and firmly bound unto the above-named Northern Pacific Railroad Company in the sum of one thousand dollars, to be paid to the said Northern Pacific Railroad Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally,
55 firmly by these presents.

Sealed with our seals, and dated the 27th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Wm. F. Prosser, Eugene Semple, H. F. Garretson, Frank H. Richards, and D. C. Guernsey, of the harbor line commission of the State of Washington; S. J. Smythe, city clerk of the city of Tacoma, and Allen Weir, secretary of state for the State of Washington, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States, ninth judicial circuit, for the district of Washington, western division, at Tacoma:

Now, therefore, the condition of this obligation is such that if the above-named Wm. F. Prosser, Eugene Semple, H. F. Garretson, Frank H. Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; S. J. Smythe, city clerk of the city of Tacoma, and Allen Weir, secretary of state for the State of Washington, shall prosecute said appeal to effect and answer all damage and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

56

WM. F. PROSSER,
EUGENE SEMPLE,
H. F. GARRETSON,
FRANK H. RICHARDS,
D. C. GUERNSEY,
S. J. SMYTHE, *Principals.*
ALLEN WEIR,
R. W. DERICKSON,
W. G. ROWLAND, *Sureties.*

Approved by—

C. H. HANFORD,
U. S. District Judge, Presiding in said Circuit.

July 30th, 1892.

(Endorsement:) In United States circuit court, district of Washington, western division. Northern Pacific Railroad Co., plaintiff, *vs.* W. F. Prosser *et al.*, defendant-. Bond on appeal. Filed July 27th, 1892. A. Reeves Ayres, clerk.

57 *Certificate to Transcript.*

UNITED STATES OF AMERICA,
District of Washington, Western Division, } *ss:*

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify the writings hereto attached to be a true transcript of the record, proceedings, and exhibits in case number 111 of the Northern Pacific Railroad Company, plaintiff, against W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, as members of the board of harbor line commissioners, and Allen Weir, secretary of

state, and George Haskins, clerk of the city of Tacoma, defendants, as the same remain on file in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at my office, in the city of Tacoma, in said district, this twelfth day of August, in the year of our Lord one thousand eight hundred and ninety-two.

Seal United States Circuit Court, District of Washington.

A. REEVES AYRES,
Clerk of said Court.

Endorsed on cover: Case No., 15,172. Washington C. C. U. S. Term No., 1202. W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, & D. C. Guernsey, as members of the board of harbor line commissioners, & Allen Wier, secretary of state, and Samuel J. Smyth, clerk of the city of Tacoma, appellants, *vs.* The Northern Pacific Railroad Company. Filed October 17th, 1892.

202 1202

FILED
OCT 10 1896
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,

vs.

W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK RICHARDS, and D. C. GUERNSEY, constituting the Harbor Line Commission of the State of Washington; GEORGE HASKIN, City Clerk of the city of Tacoma, State of Washington, and ——— SMYTHE, his successor as City Clerk of said city; and ALLEN WEIR, Secretary of State for the State of Washington,
Defendants.

No.....

BRIEF OF APPELLANT.

W. C. JONES,
Attorney General.

WILLIAM LAIR HILL, *of Counsel.*

O. C. WHITE, STATE PRINTER.

Filed this.....day of....., 189.....

.....*Clerk.*

IN THE SUPREME COURT

OF THE

UNITED STATES.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,

vs.

W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK RICHARDS, and D. C. GUERNSEY, constituting the Harbor Line Commission of the State of Washington; GEORGE HASKIN, City Clerk of the city of Tacoma, State of Washington, and ——— SMYTHE, his successor as City Clerk of said city; and ALLEN WEIR, Secretary of State for the State of Washington,
Defendants.

NO.....

BRIEF OF APPELLANT.

W. C. JONES,
Attorney General.

WILLIAM LAIR HILL, *of Counsel.*

OLYMPIA, WASH.:
O. C. WHITE, . . . STATE PRINTER.
1892.

STATEMENT OF THE CASE.

Prior to the admission of the State of Washington into the Union, the Northern Pacific Railroad Company, the plaintiff herein, by virtue of the act of July 2, 1864 (13 Statutes at Large, 365), constructed a railroad and telegraph line from Lake Superior to Puget Sound, and in front of what is now the city of Tacoma it constructed its main line of railway for a distance of about two miles on the shore of Commencement Bay, a navigable arm of Puget Sound in which the daily tide ebbs and flows, below the line of ordinary high tide.

Since the construction of its railroad as aforesaid, the company has expended a large amount of labor and money in filling in not only the portion of the shore occupied by its main line, but on either side thereof for a considerable distance, so that the same is now solid and substantial ground. It has also constructed, as appurtenant to and connected with the railway, a large number of buildings and warehouses, together with switches, turntables, landings and wharves, upon and beyond the area so filled in by the plaintiff. And the improvements thus made are alleged to be of great value and to have cost a very large sum of money.

When the State of Washington was admitted into the union, the people adopted as a part of the constitution of

the new state article XV, relating to tide waters, which is as follows:

"ARTICLE XV.

"SECTION 1. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side. The state shall never give, sell or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce.

"SEC. 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years; or the legislature may provide by general laws for the building and maintaining upon such areas wharves, docks and other structures.

"SEC. 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided."

Pursuant to this constitutional provision, the legislature at the first session enacted a law designed to put this constitutional provision into operation; which law is found on pages 736 and 737 of volume 1 of Hill's Code. Section 2120 of said volume defines the duties of the board of commissioners as follows:

"The duties of the said harbor line commissioners shall be

to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side, and to perform all other duties provided and prescribed in article fifteen of the constitution of the State of Washington, and all such other duties as the law may prescribe; and wherever and whenever said board of harbor line commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays and inlets of this state, they shall file the plat thereof in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located; and from and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor lines of that portion of the navigable waters of this state."

In pursuance of this legislation, the defendants, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards and D. C. Guernsey, were duly appointed harbor line commissioners of the State of Washington, and qualified and entered upon the discharge of their duties as such. In pursuance of this legislation, and in the performance of the duties thereby enjoined upon them, they caused an accurate survey to be made of the harbor of the city of Tacoma, and located a harbor line along the entire harbor front and in front of the area so occupied by the plaintiff with its railway tracks, station houses, warehouses, etc. They also caused an accurate plat or map to be made of the harbor front of the city of Tacoma, upon which they caused to be plainly marked or indicated the harbor line so located by them, together with the location of all improvements, wharves, railway tracks, warehouses, station

houses, coal bunkers and other structures. They also determined the width of the strip which the constitution reserves from sale, and caused a line to be marked on the plat indicating the inner line of such reserved area. They also established a waterway across a portion of the tide flats in front of the city of Tacoma, in pursuance of the provisions of the act of March 28, 1890 (see page 739 of the first volume of Hill's Code), which act is as follows:

"SECTION 1. There shall be established one or more public ways across all of the tide flats that are situated within or in front of any incorporated city or town, or within two miles either way from any incorporated city or town within the State of Washington.

"SEC. 2. The public ways provided for in section one of this act shall not be less than fifty nor more than one thousand feet wide, and shall commence at the outer or deep water end, in not less than twenty feet of water at low tide, and shall extend inland across the state's tide lands.

"SEC. 3. The public ways above provided for shall be so located as to include, as near as practicable, within their bounds all navigable streams running through the tide flats in which they are located, and at such other places as may be necessary for the present or future convenience of commerce.

"SEC. 4. All public ways established under the provisions of this act shall be well defined by posts, not less than eight inches in diameter, firmly set or driven in the ground, and of sufficient length so that they will project above the water, at high tide, not less than four feet, and such posts shall not be over four hundred feet apart; and all such public ways shall be correctly surveyed and connected by metes and bounds or such other permanent land marks as will make a lasting record; and a correct plat of all public ways so established shall be made, one copy of which shall be filed with the secretary of state, one copy with the commissioner of the public lands of the state, one copy shall be kept in the office of the chairman of the board of harbor line commissioners; and each

county shall be furnished with a correct plat of all such public ways established within its borders, and such plats shall be filed as city or town plats are filed and become a part of the county records.

"SEC. 5. All the public ways that may be established under the provisions of this act are, and shall forever be, reserved from sale or lease as public ways for water crafts.

"SEC. 6. Where the words 'tide flats' or 'tide lands' are used in this act, they shall be construed to mean all lands over which the tide ebbs and flows, and which is bare at low tide; and where the words 'ordinary water crafts' are used, they shall be construed to mean boats, barges and other water crafts drawing two and one-half feet and over of water.

"SEC. 7. The board of harbor line commissioners are hereby authorized and instructed to carry out the provisions of this act, and they shall begin operations as soon as practicable after the passage and approval of this act; and they are hereby authorized to employ such assistance and procure such material as may be necessary to carry out the full intent and purpose of this act, and the compensation for the same shall be such reasonable amount as said commissioners may deem advisable.

"SEC. 8. All bills incurred in carrying out the provisions of this act shall be audited and paid in the same manner as is provided in the act creating the harbor line commissioners for the payment of bills incurred by them."

The location of this waterway was also indicated by them upon the plat so prepared.

This action was commenced in the United States circuit court for the district of Washington, to restrain the harbor line commissioners, and the other officers made defendants, from filing this plat or causing the same to be filed, and the plaintiff exhibited the following bill to the court:

In the Circuit Court of the United States, Ninth Judicial District, for District of Washington, Western Division, Terms at Tacoma.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff*,

vs.

W. F. PROSSER, EUGENE SEMPLE, H. F. GARRETSON, FRANK RICHARDS, and D. C. GUERNSEY, constituting the Harbor Line Commission of the State of Washington; GEORGE HASKIN, City Clerk of the city of Tacoma, and —— SMYTHE, his successor as City Clerk of said city; and ALLEN WEIR, Secretary of State for the State of Washington,

Defendants.

No. .....

AMENDED AND SUPPLEMENTAL BILL IN EQUITY.

To the Judges of the Circuit Court of the United States for the Western Division of the District of Washington, in the Ninth Judicial Circuit:

The Northern Pacific Railroad Company, a corporation created and existing under the laws of the United States, brings this its amended and supplemental bill (leave of court having been first obtained) against W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskin, city clerk of the city of Tacoma, State of Washington, and —— Smythe, his successor as city clerk of said city, and Allen Weir, secretary of state for the State of Washington, citizens of the State of Washington, and thereupon your orator complains and alleges:

First: That the plaintiff is a corporation duly created, organized and existing under and by virtue of an act of congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and the acts supplementary thereto and amendatory thereof.

Second: That by section 2 of said act there was and is granted to the said plaintiff a right-of-way in language as follows, to wit: "*And be it further enacted*, That the right-of-way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed, and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations."

Third: That by the first section of said act of congress it is provided among other things as follows: "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth."

That by the fifth section of said act it was provided among other things as follows: "*And be it further enacted*, That said 'Northern Pacific Railroad' shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the

first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line of the most substantial and approved description, to be operated along the entire line."

That section 11 of said act provides as follows: "*And be it further enacted*, That said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation."

That by the 12th section of said act it was provided as follows: "*And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States."

That also by said act there was granted to said plaintiff, every alternate section of the public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any state and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.

That section 3 of said act, by which said grant of lands is made, states the objects and purposes of said grant to be as follows: "For the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to

secure safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway."

That congress also by said act reserved the right to at any time add to, alter or amend or repeal said act, having due regard for the rights of plaintiff.

That section 20 of said act, by which said reservation is made, states the objects and purposes of said reservation as follows: "That the better to accomplish the object of this act, namely, to promote the public interests and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes."

That said act of congress was amended by a subsequent joint resolution of congress, approved May 31, 1870, entitled "Resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road, and to secure the same by mortgage, and for other purposes."

That this resolution provided, among other things, the following: "And also to locate and construct, under the provisions and with the privileges, grants and duties provided for in this act of incorporation, its main road to some point on Puget Sound, by way of the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main line across the Cascade mountains to Puget Sound."

Fourth: That after the passage of said act, and prior to March 9, 1865, the plaintiff determined upon and selected the general route of the main line of its road from Lake Superior to Puget Sound, and of its branch by way of the Columbia river to Portland, Oregon. That on the said 9th day of March, 1865, the plaintiff duly signed in writing, under its corporate seal, executed as required by the provisions of section 12 of this act, its acceptance of the terms, conditions and impositions of said act, and thereupon caused the same to be served upon the President of the United States; and therewith presented and filed with the secretary of the interior, in the gen-

eral land office of the United States, a map showing the general route of its main line from Lake Superior to Puget Sound, with its branch by way of the Columbia river to Portland, Oregon. That the line designated upon the said map was by said map duly represented as the general route proposed by the plaintiff as its main line and main branch line, respectively, between the points designated in said act of congress.

Fifth: That the general route selected and determined by said company for its main line as aforesaid, and the line of general route designated upon said map as the general route of its main line between the points mentioned in said act, was located and run, and was designated upon said map as being located and run, by way of the valley of the Columbia river to Puget Sound, and lay and was represented as lying north of the 45th degree of latitude, and said general route as so determined upon and selected, and as designated by said map, was on a line north of the 45th degree of latitude, as provided by said act. That said general route as so determined upon and selected, and as designated by said map, was and is the most eligible railroad route for the main line of said railroad and telegraph line from Lake Superior to Puget Sound, and was at the time aforesaid selected and determined upon as such.

Sixth: That many years prior to November 11, 1889, and while the State of Washington was still a territory, plaintiff's main line of railroad and telegraph was constructed and fully completed in pursuance of the provisions of said act, between the city of Portland, in the State of Oregon, and the city of Tacoma, in this state, and has been in operation and maintained by said plaintiff between said points ever since its completion, continuously, to the present time; that the said main line of road, as so constructed and operated, is by way of the valley of the Columbia river to Puget Sound, and upon and by way of the general route as selected and determined upon by the plaintiff in the year 1865 as aforesaid.

That said main line of said railroad of plaintiff, as so constructed, completed and operated in pursuance of said act,

extended and now extends to the eastern boundary line of what is known as the Tacoma Mill Company's property, at or near the cove which has been for years and now is used by said mill company as a log pond; which said point of termination of said line of railroad is situated upon Commencement Bay, an arm or indentation of Admiralty Inlet, near to and east of a point where the waters of Puget Sound empty into or join the waters of said Admiralty Inlet; which said point of termination of said line of railroad is upon and within the harbor of the city of Tacoma.

That the red line drawn on the map hereto annexed, and marked "Exhibit A," shows the main line of said railroad as the same extends from Fifteenth street, in the said city of Tacoma, along in front of said city to the point of termination aforesaid; that the green colored space or width, in the center of which said red line is located, represents the right of way of said plaintiff granted by said act of congress, being two hundred feet in width on each side of the center of said main line. That at the time said act of congress of July 2, 1864, was passed and approved, all of the land over which said main line of said plaintiff's railroad now extends from Fifteenth street in the city of Tacoma to the point of termination at or near the waters of Puget Sound as aforesaid, were public lands of the United States, and all of the space included within 200 feet on either side of said line, between said points, was a part of the public domain, subject to no rights save those of the United States, and those at that date granted to this plaintiff by said act of congress.

Seventh: That in addition to the lands and part of the public domain included within said right-of-way between said points the plaintiff is the owner in fee simple and entitled to and in the possession of all the land lying between the inner boundary line of said right of-way and the platted portion of said city of Tacoma, situated between Fifteenth street in said city of Tacoma and the point of termination of said line of railroad hereinbefore mentioned, and was such owner in fee simple of all of said land for many years prior to November 11, 1889, and has been such owner continuously ever since

to the present time. That said land has not, nor has any part of it, ever been platted into lots and blocks. That so much of said land as extends from South Seventh street to the eastern boundary line of the Tacoma Mill Company's property, is more particularly bounded and described as follows: "Beginning at a point where the west boundary line of the right-of-way of the Northern Pacific Railroad (this line being west of and 200 feet distant from the parallel with the center of the main line of said railroad) intersects the north line of South Seventh street of the city of New Tacoma, Pierce county, Washington; thence running westerly on the north line of said South Seventh street to its intersection with the east line of Pacific avenue, 150 feet more or less; thence northwesterly on the east line of said Pacific avenue to a point on said east line, 800 feet more or less; thence westerly across Pacific avenue to a point where the north line of South Seventh street intersects the east line of Cliff avenue; thence in a general northerly and northwesterly course with the east line of Cliff avenue to the north line of E street, 4,110 feet more or less; thence northwesterly on said north line of E street opposite to block 3210 to the east line of said Cliff avenue, 213 feet more or less; thence in a northerly and northwesterly course with the east line of Cliff avenue to a point diagonally opposite to the northerly corner of block 3804, 2,715 feet more or less; thence northwesterly on a line coinciding with that part of said east line of Cliff avenue opposite to blocks 3604, 3705 and 3804, produced 541 feet more or less, to a point on the north line of section 32, town 21 north, range 3 east, this point being 1,150 feet east of the northwest corner of said section; thence east on the north line of said section to the southeast corner of the Tacoma Mill Company's property, to its intersection with the west boundary line of the right-of-way of the Northern Pacific Railroad, 170 feet more or less; thence southerly and southeasterly with said west boundary line of said right-of-way, 200 feet distant from and parallel with the center of the main line of the Northern Pacific Railroad to the point of beginning, 7,600 feet more or less, containing 37 $\frac{74}{100}$ acres, except-

ing therefrom Pacific avenue, being a strip of land containing 1 $\frac{40}{100}$ acres more or less, and leaving 36 $\frac{84}{100}$ acres more or less, all of the same being upon the harbor front of the city of Tacoma, in the county of Pierce, State of Washington."

Eighth: That said right of way abuts on the shore of Commencement Bay, and the line of high tide thereof, and the said above described lands abut upon the said right-of-way, and upon said shore, and the line of high tide thereof. That the plaintiff is also the owner of the littoral and riparian rights, rights of access to deep water and preference rights of purchase of the tide lands pertaining or belonging to the said lands; that said right-of-way and said lands are chiefly valuable for their right of access to deep water, and the right to construct landings and warehouses upon the same northward and westward to the navigable waters of Commencement Bay. That many years prior to November 11, 1889, plaintiff constructed and built upon the lands included within said right-of-way, and westward and northward thereof, into deep water, and the navigable water of said Commencement Bay, wharves, upon which were constructed, in addition to the tracks, switches, turn-outs, side tracks, spur tracks, station buildings and freight houses, and the other terminal facilities of its railroad; also warehouses for the accommodation of general commerce and shipping by water; coal bunkers for the accommodation of loading coal into ships, and to facilitate the shipment thereof by water; wheat warehouses and grain elevators for the accommodation of the loading of ships with wheat and other grain, and to facilitate the shipment thereof by water; all of which were constructed for the accommodation of commerce, and for the loading of ships, and to facilitate navigation and all classes of shipment by water, and ever since has continuously maintained, and does now maintain and use the same for the benefit of trade, commerce and navigation. That the land hereinbefore described is situated between said plaintiff's right-of-way and the platted portion of the city of Tacoma, and consists of a high, steep, abrupt bluff, over or across which a railroad could not be properly or safely built; that a railroad built over or across the same would not be

practicable to operate so as to reach out and connect with the shipping by water on Commencement Bay. That the space included within the right-of-way limits designated upon the map hereto attached is the only space between the said bluff and the waters of Commencement Bay upon which the tracks, station buildings and terminal facilities of said plaintiff's railroad could be located, and the only space within the city of Tacoma where said plaintiff could establish such facilities as are necessary to make possible and facilitate transshipment from rail to vessel and from vessel to rail. That the general warehouses, coal bunkers and wheat and grain warehouses built and constructed along said harbor front, upon and extending outward from said right-of-way and said abutting lands, are also necessary adjuncts to the proper operation of said railroad, and necessary to aid in and facilitate the said transshipment from rail to vessel and from vessel to rail. That the map hereto attached, marked "Exhibit A," shows said warehouses and coal bunkers, and the wharves on which they are constructed, or of which they are a part, as well as the passenger depots, freight houses, station buildings and other terminal facilities of said plaintiff's railroad, including main track, side track, turn-outs, switches and spur tracks, and all other facilities which were found necessary to be constructed upon and along said water front in the operation of said plaintiff's business as a common carrier. That the point on Commencement Bay where the plaintiff's line of railroad first reaches a place on the harbor front of the city of Tacoma where transshipment can be made from rail to vessel and from vessel to rail is at a point on plaintiff's line about opposite South Second street, or a point which would be intersected by South Second street extended. That said point is about the first point reached on the line of plaintiff's railroad going westward towards the waters of Puget Sound where water can be found of sufficient depth to accommodate the navigation of deep water vessels; and that all of the space included within said right of way of plaintiff, between said point and the point of termination of said plaintiff's line, is

required for the accommodation of the terminal facilities necessary in the use and operation of plaintiff's said railroad.

That the said buildings, warehouses and other facilities were constructed at an expense of several millions of dollars. That ever since said wharves, warehouses, buildings and other facilities were so built and constructed they have been maintained and used for the purpose of trade, commerce and business, and to aid and facilitate navigation as well as the operation of plaintiff's railroad; that the same have ever since the first construction thereof been of great benefit and assistance in building up the business and commerce of the city of Tacoma, as well as that of the entire State of Washington, and have been a source of revenue and profit to the plaintiff; that without them the plaintiff could not have performed the public services which under said act of congress are imposed on it, and could not have successfully or properly carried on the public business delegated to it by said act of congress. That for the public welfare, and for the proper establishment and maintenance of commerce and navigation, it was and is necessary that these facilities, buildings, wharves, warehouses should be constructed and maintained upon and along said water front, and should be used and continue to be used by plaintiff in connection with the operation of its said railroad.

That when plaintiff's line of railroad was originally constructed along the harbor front in the city of Tacoma, ready for operation, so much of it as extended over lands lying below or outside of the line of extreme high tide was built upon trestles constructed upon piles driven for the support thereof; that all the spurs, side tracks, switches, turn-outs, buildings, wharves, warehouses and other improvements built out over or extending upon lands lying below or outside of the line of extreme high tide, were upon said trestles constructed as aforesaid; that all of the space covered by such portions of said line of road, tracks, buildings and improvements, extending between South Fifteenth Street, and what is known as Brown's wharf, has been since the original construction of said lines of road, and was long prior to November 11, 1889, the date when said Territory of Washington was admitted as a State

of the union by the adoption of the state constitution, filled in with earth, rock and gravel, and made firm, solid ground; the said tracks, buildings and other improvements and facilities resting thereon and being supported thereby instead of upon the piling and trestles, which were removed at the time of the making of the said solid ground. That the work of filling in and replacing said trestles and piling has provided and furnished for the occupation, operation and maintenance of said line of railroad a continuous line of solid ground from South Fifteenth Street to a point where navigation available for water craft and vessels generally is first reached by said line of railroad.

That the upland abutting upon the waters of said Tacoma harbor, and the approaches from the land down to the water, were so steep and abrupt that in order to reach with the line of said road the navigable waters of said harbor or of Puget Sound, at said place, available for the navigation of vessels and water craft generally, it became and was necessary to construct the line of plaintiff's road, in most places along said water front below the line of extreme high tide, and in many places below the line of ordinary high tide, and to make the construction, operation and maintenance of said line of railroad practicable for the reaching of deep water navigation, said line of railroad was so constructed along said harbor.

That owing to the necessity for the speedy completion of said line of road, to make it ready for operation, it was not possible to do the work of filling in, and the making of solid ground, along the line of said road upon the water front, at or before the time of the original construction of said road; but after said road had been in operation for some years it became necessary, for the proper and convenient operation of its line along said water front, that said piling and trestles by which it was supported and over which it extended should be replaced by solid, firm ground at all points along said water front where it was possible to carry on or accomplish the work of filling in. That for the greater part of the distance over which the line of the plaintiff's road extends to the northward and westward of Brown's wharf, the said line of

road, as well as most of the side tracks, spurs, switches, turn-outs, platforms, stations, wharves, buildings and other improvements, are built upon trestles supported by piles driven for that purpose. That for the greater part of said distance, said line of road, and most of said improvements and facilities, are beyond, below and outside of the line of extreme high tide, and at many points and places said line of railroad and many of the improvements and facilities are below, beyond and outside of the line of ordinary high tide. That in many places along within said distance where the main line of said railroad and the center line of said right-of-way is not outside of, below or beyond the line of ordinary high tide, many of the proper and necessary facilities and improvements, necessary for use in connection with the operation of said line of railroad, are situated outside of, beyond and below the line of ordinary high tide, such as side tracks, spurs, switches, wharves, warehouses, coal bunkers and elevators, for which there is no available space, possible to be obtained, between the center line of the main track of said railroad and the shore along the steep and abrupt bluff of the upland, and which, in order to be adapted to their use, must be located on the side of the main track next to the sea or waters available for navigation. That plaintiff's said line of railroad along said harbor front, and the facilities and improvements built upon and along on either side thereof, and in use in connection therewith, are constructed in such a connected way as to form a continuous line of improvements at all points along said water front, extending outward from the land to available navigation, and so connected with improvements upon the land, abutting on the shore, as to become a part thereof and in the nature of an extension therefrom, and in such a way as not to be or become an obstruction or hindrance to navigation, and so as not to interfere with navigation in any way whatever, but are so constructed that they can be and are used, and are at all times available for use, in aid of both commerce and navigation.

That all of the tracks, buildings, structures and facilities constructed and in use in connection with the operation of

said line of railroad along said water front are located and constructed within the limits of said plaintiff's right-of-way, even where they extend beyond and outside of the line of ordinary high tide, except small portions of the outer ends of some of the coal bunkers, wharves and docks, which, in order to make them available for the peculiar use to which they are designed, are extended beyond the outer boundary line of the right-of-way, but only to such an extent as will make them available for their use, and to no further distance or extent, and without forming any obstruction or hindrance to navigation.

Ninth: Under and by virtue of said act of congress, the said plaintiff's right-of-way hereinbefore described as situated along the harbor front of the city of Tacoma is the property of the plaintiff for the uses and purposes designated in said act, and is not subject, nor any part of it, to the rights or uses of any other corporation, state, municipal or private, or of any individual so long as the plaintiff so continues to use it for railroad purposes in accordance with said act of congress; and that so long as plaintiff so uses it for such purposes it is entitled to the exclusive possession and use thereof, and the same is not subject to be taken or to be seized by the State of Washington or any persons acting by, through or under the authority of said State of Washington.

Tenth: That under and by virtue of an act of the legislature of the State of Washington, approved March 26, 1890, entitled "An act for the appraising and disposing of the tide and other lands belonging to the State of Washington," said plaintiff is entitled to the exclusive right for sixty days following the final appraisement of the tide lands in front of the city of Tacoma to purchase the lands so improved by the construction of said wharves, warehouses and other improvements, and the said plaintiff desires to and intends to avail itself of said exclusive right of purchase as to all lands covered by any portion of said improvements which extend beyond and outside of the limits of said right-of-way as well as of all the tide lands over which plaintiff has littoral or riparian

rights by reason of the ownership of the uplands and right-of-way abutting thereon, as hereinbefore set forth.

Eleventh: That under and by virtue of the act of the legislature of the State of Washington, approved March 28, 1890, entitled "An act to create a board of harbor line commissioners," and prescribing their duties and compensation, the governor of the state appointed as such commissioners the defendants, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards and D. C. Guernsey. That the members of said harbor line commission have duly qualified as such, and entered upon the discharge of their duties as such commissioners, and are about to take final action in the location and establishment of the harbor lines within the limits of the city of Tacoma, and that, as plaintiff is informed and believes, said commission proposes and are about to locate and establish such harbor line in such a way as to include within such harbor lines a part or the whole of the improvements of the plaintiff hereinbefore mentioned, including a portion of the plaintiff's right-of-way, and the wharves, tracks, stations and other terminal facilities located thereon. That the extension of the harbor lines over said improvements is an attempt of the board on the part of the said harbor line commission to exercise unauthorized power, and to do an act which is not within the jurisdiction of said harbor line commission. That said harbor line commission has not authority or jurisdiction under the laws of the State of Washington, as plaintiff is informed and believes, to embrace or include within the harbor lines to be located and established in front of the city of Tacoma the wharves, coal bunkers, docks, warehouses and other improvements made thereon. That if the harbor line commission aforesaid is not prevented by a writ of injunction from this honorable court from extending the so-called harbor lines over the wharves, warehouses and other improvements of the said plaintiff, the said commission will so extend said lines, and thus deprive the said plaintiff of the use and benefit of its said wharves, warehouses, tracks, stations and other terminal facilities, including a portion of the plaintiff's right-of-way, without any compensation therefor, and without due

process of law, or process of law whatsoever, and will thus cloud plaintiff's title to the same in such a manner as greatly to embarass and hinder plaintiff in the legitimate use of its said property.

Twelfth: That the possession which the plaintiff now has of the tide lands in front of the lands hereinbefore described is a valuable right to it, and the preference right which the said plaintiff has under the laws of the State of Washington for the purchase of the tide lands upon which are situate valuable improvements, as hereinbefore stated, is a vested right, and of great value to the plaintiff.

Thirteenth: That the defendants above named, the members of the harbor line commission, in threatening to locate the said harbor lines over the said property and improvements of the plaintiff, are acting entirely without warrant of law, and are acting and threatening to act entirely beyond the scope of their authority, and are transcending and threatening to transcend the authority conferred upon them as said harbor line commissioners by the said act of the legislature of the State of Washington. That the said defendant commissioners, in so acting and so threatening to act, are assuming powers over the property and improvements of the plaintiff which are not vested in defendants by law, and are infringing and threatening to infringe upon the vested rights of the plaintiff without warrant or authority of law.

Fourteenth: That the above named defendants, the members of the harbor line commission, are threatening to and are about to locate and establish along in front of plaintiff's right-of-way, where the same extends between Fifteenth street and what is known as Brown's wharf, in the city of Tacoma, a water way; that the said defendants, the members of said harbor line commission, in the location and establishing of said water way, claim to be acting in the exercise of authority which they claim to have been conferred upon them by an act of the legislature of the State of Washington, approved March 28, 1890, entitled "An act to establish and define public ways for water crafts across the tide flats within, in front of, and

for a mile either way from all incorporated cities and towns in the State of Washington."

That section 2 of said act provides as follows:

"SEC. 2. The public ways provided for in section one of this act shall not be less than fifty nor more than one thousand feet wide, and shall commence at the outer or deep water end, in not less than twenty feet of water at low tide, and shall extend inland across the State's tide lands."

That there is not at low tide as much as twenty feet in depth in front of or beyond plaintiff's right-of-way from Fifteenth street to said Brown's wharf, and, as plaintiff is informed and believes, it is the purpose and determination of said defendants, the members of said harbor line commission, to establish and locate the commencement, or outer, or deep water end of said water way at some point between Brown's wharf and said Fifteenth street, but at what place between said points the outer end is to be established, plaintiff has not any accurate or definite knowledge or information, except that it may be inferred from the lines designated on the maps prepared by the commissioners that said water way will commence at or about a point opposite the south and east line of said Brown's wharf. That for several years continuously prior hereto the work of filling in with earth, gravel, rock, brush and other material of that portion of plaintiff's right-of-way between Sixteenth street and Brown's wharf which extended over land where the tide ebbed and flowed, has been going on, and said work was completed prior to the time when said harbor line commission first commenced operations or gave any attention to the consideration of harbor lines or water ways within the harbor of the city of Tacoma; that the entire width of said right-of-way between Fifteenth street and said Brown's wharf has been solidly filled with earth, and is now, and has for a long time been, solid, firm and permanent ground, over which the tides do not ebb or flow; that for the maintaining and perfecting of the ground so filled in, within the limits of said right-of-way, between the points aforesaid, and for the accommodation of landing places and warehouses, a space lying adjacent and in front of said right-of-way be-

tween said points was also filled in solidly and made firm, substantial and permanent ground; that said space, extending out from and running along in front of said right-of-way, is of varying width, but so filled in as not to be an obstruction to navigation, but constituting a facility for and in aid of navigation; that said water way, if so established, will seriously and injuriously interfere with the proper use of said plaintiff's right-of-way, and the improvements thereon and extending outward therefrom, destroy the convenient and proper access to said right-of-way and the said improvements; that the said members of said harbor line commission, in the location and establishment of said water way, as proposed, are acting without authority of law, and in violation of the property rights of this plaintiff. That upon the outer line of the space filled in outside of the right-of-way, extending between Fifteenth street and Brown's wharf, as in this paragraph set forth, plaintiff built a sea wall, adapted in all respects, both as to height and depth and method of construction, for the making and operation of a deep water channel outside of the same of a depth of between 30 and 40 feet; that at the time said filling in was done and said sea wall constructed there was no channel south or east of said Brown's wharf having any depth of water sufficient for purposes of navigation, or of sufficient width to be available for practical use, and all the lands lying to the northward of such channel as there was between Fifteenth street and Brown's wharf on the outside of said sea wall was mud flats, or tide lands, which were entirely bare at low tide, and the waters flowing over same were not, and are not now navigable for vessels at any stage of the tide, and never were.

Fifteenth: That the said defendants, the harbor line commissioners, have made and prepared a plat, showing the location by them of said harbor lines and of said water ways within the limits of the city of Tacoma. That said plat, if filed, will consist of several maps showing said harbor lines or areas as the same are situated along the various portions of the water front of said city.

That the map hereto attached, marked "Exhibit B," is a

copy or blue print of one of the maps intended by said harbor line commissioners to be made a part of said plat, and is intended to show so much of said harbor lines or harbor area intended or about to be located and established by said commission, as extends from the west line of the Tacoma Mill Company's plant to the east line of Brown's wharf, or the west line of South Fourth street extended, and said map also shows so much of the harbor lines and harbor area 150 feet in width as extends from the west line of South Fourth street to the west line of South Seventh street extended, said last mentioned harbor lines and harbor area being intended and designed by said commission to be located and established upon, along, and over and covering, and including within their limits, the grounds filled in between the outer line of plaintiff's right-of-way and the sea wall constructed by plaintiff, as aforesaid, where there were not at the time of the preparation of said maps, and are not now, any navigable waters or any waters of any kind, at any stage of the tide, but solid, firm ground over the entire portion of the limits of said area and between said lines. That it is the intention and design of said harbor line commissioners to locate and establish said harbor lines and harbor area along the water front of Tacoma between said west line of the Tacoma Mill Company's property and said east line of Brown's wharf, as aforesaid, as designated upon said map, and so that the said area shall extend 400 feet inward from the outside line designated upon said map. That all parts or portions of plaintiff's facilities, improvements, tracks, buildings and structures, which are situated or extended outside of and beyond the line of ordinary high tide (where said tide line is outside of the meander line, and not more than 400 feet distant inward from the outer line designated on said map), are included within said harbor area or harbor lines, and the said harbor lines, as intended to be located and established and as will be located and established by said commissioners if said map is allowed to be filed, will extend over said improvements, right-of-way, facilities, tracks, buildings and structures, and the said location made by said commissioners will include and

cover many of plaintiff's most valuable improvements and a large part of the right-of-way on which the same are situated.

That the map hereto attached, marked "Exhibit C," is a copy or blue print of one of the maps prepared by said commissioners and intended to be made a part of the plat about to be filed by said commissioners as a part of the process of locating and establishing the harbor lines and harbor areas upon the water front of the city of Tacoma. That it is intended by said commissioners, and it is their design, to locate, and they are about to locate and establish, harbor lines and harbor areas as designated upon said map, extending from the east line of South Seventh street extended to the east line of South Twelfth street extended; that the lines are so drawn and located as to provide for a harbor area 150 feet in width (including within their limits all of the space filled in between the outer line of plaintiff's right-of-way and said sea wall), extending from South Seventh street to South Twelfth street; and also harbor lines are designated upon said map as intended to be located and established by said commissioners, extending seaward and at right angles from the lines and area above mentioned, where the same ends at South Twelfth street; said lines extending seaward 600 feet, and so drawn as to provide for a harbor area of 150 feet in width, and connecting at their outer ends with harbor lines and a harbor area extending from South Twelfth street to South Seventh street, and running parallel with the harbor area located between the plaintiff's right-of-way and sea wall, said outer harbor lines or outer harbor area being 600 feet, uniformly, to the seaward from said inner harbor lines or area. Said map also represents a water way designed to be located and established by said commissioners extending as far south and east as to the east line of South Twenty-third street, but the initial point of which, to the seaward, cannot be ascertained from any inspection of the maps or plates of said commission or from any information which plaintiff has been able to obtain, but so far as plaintiff is able to ascertain from such information as it has obtained, it is plaintiff's belief that it is intended and designed by said commission to establish said water way be-

tween South Twelfth street and South Twenty-third street, with a probable extension of the same seaward from South Twelfth street to a point about opposite the east line of Brown's wharf.

That the map hereto attached marked "Exhibit D" is a copy or blue print of one of the maps intended by said commissioners to be made a part of the plat to be filed as a plat of the harbor lines of the city of Tacoma; that said map shows so much of the harbor lines and areas as extends from the east line of Brown's wharf to South Seventh street, and also the lines and area running parallel therewith and 600 feet distant therefrom; and also the lines extending at right angles to said parallel lines at the ends thereof next opposite said Brown's wharf and extending across the front of Commencement Bay, and extending northward and seaward, and at right angles, from the lines and areas running along the shore front — said lines including within their limits an area of 600 feet it width.

That the map hereto attached, marked "Exhibit E," is a copy or blue print of one of the maps intended and designed by said commissioners to be made a part of the plat to be filed as a part of the location and establishment of the harbor lines of the harbor of Tacoma, and shows the lines and harbor area extending from the west line of the Tacoma Mill Company's property westward along the water front of the city of Tacoma.

That the map hereto attached, marked "Exhibit F," is a copy or blue print of one of the maps intended by said commissioners to be made a part of the plat to be filed, as aforesaid, and there is designated upon it the extension of the lines and area described or marked out upon "Exhibit E."

That the maps hereto attached, marked respectively "Exhibits G, H and I," are copies or blue prints of similar maps showing other portions of the harbor lines and areas intended to be located and established by the filing of the plat mentioned in this bill.

That a plat containing the lines and areas designated upon said maps has been made and prepared by said defendants

the harbor line commissioners, and they now threaten to file said plat in the office of the defendant Allen Weir, said secretary of state, and in the office of said George Haskin, the said city clerk of the city of Tacoma (and who, since the filing of the original bill herein, has been succeeded in the office of clerk of the city of Tacoma by —— Smythe, who is now the qualified and acting clerk of said city); and said plaintiff fears, unless restrained by this honorable court, that the said commissioners will so offer said plat for filing, and that said George Haskin, the said clerk of the city of Tacoma (or the said —— Smythe, as his successor), and the said defendant Allen Weir, said secretary of state, will so file said plat.

Sixteenth: That at the time the original bill herein was filed, this plaintiff did not know and could get no definite information concerning the exact nature of the plat which the defendants the harbor line commissioners, threatened and were about to file, except that the plaintiff ascertained that the plat which said commissioners were about to file had designated thereon harbor lines and harbor areas which covered and included within their limits many of the buildings, structures and valuable improvements, and a large part of the right-of-way of plaintiff, situated along the water front of the city of Tacoma.

That previous to the commencement of this action, and at the time of the filing of the original bill herein, the said defendants the harbor line commissioners, and the officers and representatives of the board which they constituted, declined and refused to show plaintiff, or any one representing it, the said plat about to be filed, or any of the maps constituting the same, and refused to permit or allow plaintiff, or any one representing it, to make an inspection of the same, or to obtain any copy thereof, and no one representing plaintiff had any opportunity to examine said plat or said maps, or to know or ascertain anything about the same until after the original bill was filed herein, and the restraining order of the court had been issued and served; and plaintiff was therefore unable to allege in its original bill the precise nature of said maps or plat, or to allege anything definite concerning the same.

Seventeenth: That the said threatened acts of the said harbor line commissioners, and the said city clerk, and the said secretary of state, if carried out, will work great, lasting and irreparable damage and injury to the plaintiff, which damages and injury are not susceptible of compensation in damages. That the plaintiff has no plain, adequate or speedy remedy at law, and has no adequate remedy in the premises, except by the issuance of a writ of injunction by this honorable court; that there is danger that unless the said defendants are restrained from the doing of said threatened unlawful acts, pending the determination of the plaintiff's application for an injunction, great and irreparable injury will result to the plaintiff.

To the end therefore, That said harbor line commissioners, to wit, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards and D. C. Guernsey, and the said George Haskin, clerk of the city of Tacoma (and his successor in office —— Smythe), and said Allen Weir, secretary of state for the State of Washington, may full, true, direct and perfect answer make, according to the best of their knowledge, information and belief, to all and singular the matters and charges aforesaid, your orator hereby waiving the necessity of the answer of the defendants, or of any of them, being put in under oath of any of said defendants, and that as fully and particularly in every respect as if the same were here again repeated, and the said defendants and each of them thereunto particularly interrogated, and that your orator may have it adjudged and decreed that a writ of injunction of this honorable court shall issue to the said harbor line commissioners, to wit, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards and D. C. Guernsey, and to the said George Haskin, clerk of the city of Tacoma (and his successor in said office, —— Smythe), and to the said Allen Weir, secretary of state, as aforesaid, and to each of them, enjoining and restraining the said commissioners, and each of them, from extending, locating or establishing the harbor lines in front of the city of Tacoma, or in the harbor of the city of Tacoma, over any of the wharves, ware-

houses, tracks, stations or other terminal facilities included within any portion of a strip two hundred feet in width on either side of plaintiff's main line of railroad, as the same runs along the harbor front of the city of Tacoma from Fifteenth street in said city, northwardly and westwardly to the cove used as a log pond or log dumping grounds by the Tacoma Mill Company, at the western boundary line of the land described in this bill; and from extending, locating or establishing said lines over any portion of the said width of two hundred feet on either side of said main line of track as the same runs along said harbor front as aforesaid; also from extending, locating or establishing said harbor lines over any of plaintiff's wharves or its other facilities of navigation or commerce extending out from or in front of said strip or the adjacent upland in said bill described; and from locating or establishing any water ways upon, along or over or in front of any portion of said width of two hundred feet on either side of the center of the main line of plaintiff's railroad where the same runs along said harbor front from Fifteenth street in a northwardly and westwardly direction to the structure known as "Brown's wharf," in said city of Tacoma.

And enjoining and restraining the said George Haskin, city clerk of said city of Tacoma (and his successor in said office, —— Smythe), and the said Allen Weir, secretary of state for the State of Washington, from receiving or filing any plat or map showing the location of said harbor lines in front of or within the harbor of the city of Tacoma over any of the wharves, tracks, stations or other terminal facilities included within a width of two hundred feet on either side of the center of said plaintiff's main line of railroad along the harbor front of said city of Tacoma, or extending out from or in front of said width; or any map or plat showing the said harbor lines over any portion of said width, or showing the location of any water way upon, along, over or in front of said width of two hundred feet upon either side of the center of the main line of plaintiff's railroad where the same extends from Fifteenth street to Brown's wharf.

And that pending the hearing of the plaintiff's application

for the said order directing the issuance of said injunction, your orator may have granted an order restraining the defendants, the said harbor line commissioners, and each of them, from so extending, locating or establishing the harbor lines in front of the city of Tacoma, over any of the wharves, warehouses, tracks, stations or other terminal facilities included within any portion of a strip two hundred feet in width on either side of plaintiff's main line of railroad, as the same runs along the harbor front of the city of Tacoma from Fifteenth street in said city northwardly and westwardly to the cove used as a log pond or log dumping ground by the Tacoma Mill Company at the western boundary of the land described in this bill.

Also, from extending, locating or establishing said lines over any portion of the said width of two hundred feet on either side of said main line of track as the same runs along said harbor front as aforesaid.

Also, from extending, locating or establishing such harbor lines over any of the plaintiff's wharves or its other facilities of navigation or commerce extending out from or in front of said strip or the adjoining upland in said bill described.

And from locating or establishing any water ways upon, along, over or in front of any portion of said width of two hundred feet on either side of the center of the main line of plaintiff's railroad where the same runs along said harbor front from Fifteenth street in a northwardly and westwardly direction to the structure known as Brown's wharf, in said city of Tacoma.

And adjoining and restraining the said George Haskin, city clerk of said city of Tacoma (and his successor in said office, —— Smythe), and the said Allen Weir, secretary of state of the State of Washington, from receiving or filing any plat or map showing the location of said harbor lines in front of or within the harbor of the city of Tacoma over any of the wharves, warehouses, tracks, stations or other terminal facilities included within a width of two hundred feet on either side of the center of said plaintiff's main line of railroad along the harbor front of said city of Tacoma or extending

out from or in front of said width; or any map showing the said harbor lines over any portion of said width, or showing the location of any water way upon, along, over or in front of said width of two hundred feet upon either side of the center of the main line of plaintiff's railroad where the same extends from Fifteenth street to Brown's wharf.

And that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet.

May it please your honors to grant unto your orator a writ of subpena of the United States of America, directed to the said W. F. Prosser, Eugene Semple, H. F. Garetson, Frank Richards and D. C. Guernsey, constituting the harbor line commissioners of the State of Washington, and George Haskin, city clerk of the city of Tacoma (and his successor in office, —— Smythe), and Allen Weir, secretary of state for the State of Washington, commanding them and each of them on a certain day to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

MITCHELL, ASHTON & CHAPMAN,
ANDREW F. BURLEIGH,
Solicitors and Counsel for Plaintiff.

To this bill the defendant interposed a general demurrer, which was overruled by the court. Whereupon the defendants elected to stand on their demurrer, the decree of the court restraining the defendants from causing the plat to be filed was made absolute, and defendants appealed to this court.

Plaintiff does not state in what way the filing of this plat will produce the irreparable damage or injury complained of, and we are left to infer the nature of the apprehended injury by deduction from the pretended rights,

property and privileges in the area exhibited on this plat, as set forth in plaintiff's petition.

So far as can be gathered from the petition, the plaintiff bases its rights in the premises upon the following grounds:

First: That by its charter, heretofore referred to, it was granted a right-of-way through the "public lands" of the United States, to the extent of two hundred feet in width on either side of its tracks, and it is contended that the area in dispute, viz., the shore of Commencement Bay, was, at the time of the construction of the railway thereon, "public lands of the United States" within the meaning of its charter, and that plaintiff, by the construction of its road upon such area, acquired the same rights of ownership and possession that it did to any other part of its right-of-way.

Second: That the plaintiff is a public agency, and was chartered by the government of the United States for the purpose of causing a great public work to be constructed, which work, when constructed, was designed to be used in case of necessity by the general government for the purpose of transporting troops, munitions of war, etc., and for the purpose of a postal route; and that the nature of the work requires that it should have terminal facilities in the navigable waters of Puget Sound.

Third: That congress had the authority, under the constitutional power, "to regulate commerce between the states," to grant to the plaintiff the right to construct wharves and other conveniences of commerce to facilitate the transshipment of merchandise, as well as troops and munitions of war, from rail to vessel and vessel to rail,

and as an incident to such power had the right to authorize this railway company to appropriate all the valuable water front of a large city to its own use, and that the charter of the company, which authorized it to construct a railroad and telegraph line "*from a point on Lake Superior to a point on Puget Sound*," impliedly confers upon the plaintiff the authority to construct such wharves and conveniences, and to appropriate the water front of the city of Tacoma.

Fourth: That it owns the uplands contiguous to the line of ordinary high tide along the shore on which its track is laid, and the improvements mentioned have been constructed, and that by virtue of such littoral ownership, it possesses certain valuable rights in the premises, viz., the right of access and the right to wharf out to deep water; and that the location of the harbor lines, as indicated on the plat, will in some way interfere with these littoral rights of plaintiff.

Fifth: That it has certain preference rights of purchasing the area occupied by its improvements from the state, by virtue of the act of March 26, 1890. (See sections 2162–2179 of Volume 1, Hill's Code.)

The provisions under which this last right is created is section 2172 (*id.*), and is as follows:

"SEC. 2172. The owner or owners of any lands abutting or fronting upon or bounded by the shore of the Pacific Ocean or of any bay, harbor, sound, inlet, lake or watercourse, shall have the right for sixty days following the filing of the final appraisal of the tide lands to purchase all or any part of the tide lands in front of the lands so owned: *Provided*, That if valuable improvements in actual use for commerce, trade or business have been made upon said tide lands by any person,

association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid: *Provided further*, That the occupant who has, prior to the passage of this act, planted oysters in any bay or arm of the sea upon ground not covered with natural oysters, or who has, prior to the passage of this act, acquired by purchase the rights of any other person or corporation to such occupancy, the same being not within or in front of the limits of any incorporated city or town or within two miles on each side thereof, shall have the exclusive right to purchase the land so occupied for the period aforesaid, to an extent not exceeding eighty acres: *Provided*, That nothing in this chapter shall be so construed to apply to any improvements made after the passage of this act."

Based on the foregoing propositions, the plaintiff contends that the threatened action of the harbor line commissioners in filing the plat which they have prepared will in some way cloud the title of the plaintiff to some or all of these rights.

The defendants on the other hand contend—

First: That the grant of a "right-of-way through the public lands of the United States" contained in plaintiff's charter did not authorize it to construct its line of railway upon the shores of the tide waters of Puget Sound, for the reason that such shores are not "*public lands*" within the meaning of the grant."

Second: That the grant of a right-of-way to build a railway "*from a point on Lake Superior*" to "*a point on Puget Sound*" did not authorize the plaintiff to construct its railway *into* the waters of Puget Sound, nor to build any wharves or other structures therein.

Third: That congress has no authority under the constitution to grant the shores of the navigable tide waters

of Puget Sound to the plaintiff for a right-of-way or for the construction of wharves, warehouses, stationhouses or other buildings.

Fourth: That if they are wrong in the third contention, nevertheless congress has made no attempt to grant the plaintiff any such authority.

Fifth: That by the ownership of the uplands contiguous to the line of ordinary high tide and abutting on the area in dispute, the plaintiff acquired no riparian or other rights which it can assert in the tide waters of the State of Washington adverse to the authority of the state.

Sixth: That it has no preference or other right to purchase any of the area defined by the board of harbor line commissioners and reserved by the constitution of the state for wharves, landings and other conveniences of commerce.

I.

With respect to the first proposition, it has been frequently held by this court that the shore of tide waters is not "public lands of the United States" within the meaning of the constitution or any act of congress in which the term "public lands" has been used.

In the case of *Newhall vs. Sanger*, 92 U. S. 761, the court says:

> "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

To the same effect are the cases of—

Leavenworth, etc., Ry. vs. United States, 2 Otto, 733.
Dubuque, etc., Ry. vs. Litchfield, 23 How. 66.
Doolan vs. Carr, 125 U. S. 618.

See also *McManus vs. Carmichael*, 3 Iowa, 1.
Mayor vs. Eslava, 9 Porter (Ala.), 577.
Angell on Tide Waters, p. 153.
3 Kent's Commentaries, p. 427.
United States vs. Pacheco, 2 Wall. 587, 590.
Galveston vs. Menard, 23 Texas, 349.
Gough vs. Bell, 1 Zab. (N. J.), 156, 162, 163.
Pollard vs. Hagan, 3 How. 212, 230.
United States vs. Gratiot, 14 Pet. 526, 537.

In that case the court says (p. 537): "The term 'territory' as here used is merely descriptive of one kind of property, and is equivalent to the word lands;" and as we have heretofore shown, the soil underlying navigable waters is not land.

We think we can confidently assert that no decision can be found in which the term "public lands" has been construed to embrace any of the area lying below the line of ordinary high tide.

II.

Appellants contend that the entire scope of the language used by congress in the charter of the plaintiff indicates that it did not intend to authorize plaintiff, after reaching its western terminus, Puget Sound, to appropriate the shores of the harbors of that body of water to its own use

and subject them to occupation by it for railroad purposes, or to construct yards, depots, warehouses, offices or other structures thereon. The very language of its authority to build a railroad "*from a point on Lake Superior to a point on Puget Sound*" excludes such an inference. The intention was to authorize the building of a railroad simply *between* those two bodies of water. In section 2 plaintiff is expressly authorized to take grounds for "station buildings, work shops, depots, machine shops, switches, sidetracks, turntables and water stations;" but there is no language used in that section which can be construed to be so much as a suggestion that the plaintiff might appropriate the shores of navigable waters for the building of wharves.

Again, in section 5, prescribing the manner in which the railroad shall be constructed, it is provided that the road shall be constructed with all the "necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal, etc." No structure is there mentioned which could be construed to refer to or include even by implication such structures as wharves, coal bunkers or other erections designed to facilitate transshipment from rail to water and water to rail, and the phrase "and all other appurtenances" manifestly applies to such appurtenances as furniture and rolling stock, and not appurtenances of a character and nature wholly different from any structure mentioned in the section.

Again, in the joint resolution passed by congress, authorizing the company to issue bonds (see 15 Statutes at Large,

346), this charter is referred to as an authority for building a railroad and telegraph line *between* Lake Superior and Puget Sound. All of these provisions indicate that it was the intention of congress that when the road had reached its terminus at a point on Puget Sound, its authority to continue the construction of the road beyond that point had ceased so far as its original charter is concerned.

III AND IV.

The precise question whether congress has the power to make a valid grant of the shore or bed of tide waters in a territory so as to preclude the future state from the right to assert her sovereignty and proprietorship over the area thus granted has never been presented to a court of last resort, for the reason, probably, that congress has never attempted to make any such grant. But numerous expressions have been used in the decisions of this court which could not be harmonized with the recognition of such a power on the part of congress. Thus in the case of *Mumford vs. Wardwell*, 6 Wall. 436, the court says:

"The settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the constitution to the United States, but were reserved to the several states; and the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders."

And in *Pollard vs. Hagan*, 3 How. 230, the following language is used:

"To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable

waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty and deprive the states of the power to exercise a numerous and important class of public powers."

These cases are emphatic authorities to the effect that congress has not the power to grant the shores and beds of navigable waters within a *state*. But it is contended that prior to the admission of the state into the union, the government of the United States is the sovereign and proprietor of such shores and beds, and that, therefore, while the territory remains in that condition it is competent for the general government to make a valid grant of such area. This result can, however, only be reached by assuming that the states, by the adoption of the federal constitution, created a new government with functions and powers which it is manifest the original framers of that document, and those who were instrumental in bringing about the federal union, did not contemplate. The federal government has derived all the powers that it possesses from the states which created it, and can exercise no power or function except such as have been expressly granted or by necessary implication. It has been often held in this court that the jurisdiction and proprietorship of the shores and beds of the navigable waters is one of the necessary and essential attributes of sovereignty. And the power on the part of the federal government to dispose of such navigable waters within a territory could only be supported on the theory that, prior to the admission of that state into the union, the jurisdiction of the general government over such territory was the jurisdiction and proprietorship of a sovereign. It is true that congress has the power to make all necessary

laws for such territory, but that is because the states have by the constitution expressly invested the general government with that power. But there is nothing in the constitution of the United States which can by any fair interpretation be construed to vest in the general government the functions and attributes of sovereignty over such territory. And if, as is shown in the case of *Pollard vs. Hagan*, *supra*, it would be dangerous to vest in the general government the power to transfer to a citizen the title to the shores and soils under the navigable waters of a state, it would be equally dangerous to give congress the power to dispose of the navigable waters of a territory. For it is one of the underlying and fundamental principles of our form of government that a territory of the United States, upon attaining a sufficient population and wealth, shall be erected into a separate state and admitted into the union on an equal footing with all other states of the union. And it would be an act of manifest injustice for congress, even if it had the power to do so, to make grants which would result eventually in bringing a community into the union as a state degraded below the rank of her sister states, despoiled of a portion of her most important powers and functions, and robbed, to that extent, of the attributes of sovereignty which belong to all other states of the union. Indeed, in the case of *Barney vs. Keokuk*, 94 U. S. 324, 338, this court clearly intimates that that power does not exist.

In the case of *Mayor v. Eslava*, 9 Porter (Ala.), 602, the court, speaking of the absolute dominion and proprietorship of the state over all its navigable waters, says:

"The 'original states' possessing this interest in the waters within their jurisdictional limits, the *new states* cannot stand on an equal footing as members of the union if the United States still retain over the navigable waters any other right than is necessary to the exercise of its constitutional powers."

In *Huse v. Glover*, 119 U. S. 546, the court uses this language, in speaking of the State of Illinois:

"On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states."

Again, in *Webber v. Harbor Commissioners*, 18 Wall. 65, the same court says:

"Upon the admission of California into the union upon equal footing with the original states, *absolute property in and dominion and sovereignty over* all soils under the tide waters within her limits passed to the state."

In *Withers v. Buckley*, 20 How. 84, 93, the same court says:

"Clearly, congress could exact of a *new state* the surrender of no attribute inherent in her character as a sovereign, independent state or indispensable to her equality with her sister states, necessarily implied and guaranteed *by the very nature of the federal compact.* Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, water courses and highways situated within the state."

Again, in *County of St. Clair v. Livingston*, 23 Wall. 68, the court says:

"By the American Revolution the people of each state in their sovereign character acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to

the states, respectively; and *new states* have the same rights of sovereignty and jurisdiction over this subject as the original ones."

In *Chapin v. Bourne*, 8 Cal. 295, the supreme court of California uses the following language:

"It (the title to the soils underlying navigable waters) belonged to the United States *in trust* for any new state that might be erected out of said territory, and passed to the State of California on her admission by virtue of her sovereignty."

In *Haight v. Keokuk*, 4 Iowa, 213, the supreme court of that state says:

"It has been held that the government cannot convey the land between high and low water mark on the public or navigable rivers, and that this space and these waters belong to the state. Although no state may exist at the time of such grant, as in this case, yet grants and sales made under such circumstances are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its rights when arisen. It is our opinion, therefore, that the complainant's right to soil is to be limited to the line (high water mark) established in the case of *McManus v. Carmichael.*"

In *Bissell v. Henshaw*, 1 Sawy. (U. S. C. C.) 579, the court says:

"By the admission of California into the union it became, by virtue of its sovereignty, entitled to *all* the lands below ordinary high water mark according to *Pollard's Lessees v. Hagan*, 3 How. 212, and other cases."

See also—

McCready v. Virginia, 94 U. S. 391.
Packard v. Bird, 137 U. S. 661.
Hardin v. Jordan, 140 U. S. 371.
Hinman v. Warren, 6 Ore. 408, 411.
McManus v. Carmichael, 3 Iowa, 1.

In view of the foregoing authorities, it must be conceded that the power of congress to make such a grant as is contended for by the plaintiff in this case is extremely doubtful. And congress cannot be presumed, in the absence of the clearest and most unequivocal terms, to make a grant which it did not have the undoubted power to make. Indeed, if its power in this regard were not doubtful, the same presumption would follow, in view of the well established principle of law, that public grants to private citizens or corporations are strictly construed against the grantee, and pass nothing by implication. He who seeks any right derived from a public grant must point to the very words in the grant which clearly and unequivocally express the intention on the part of the legislature to extend the right, privilege or franchise to the limit claimed. Such has been the uniform doctrine of the courts, and it is well stated in the case of *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Pa. St. 9, 22, as follows:

"When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending its privileges, let the legislature see to it, but let it be remembered that nothing but plain English words will do it."

And in the case of *United States v. Arredondo*, 6 Pet. 691, 738, this court quotes with approval the following language:

"Public grants convey nothing by implication; they are construed strictly in favor of the king. * * * Grants of

the strongest kind, *ex speciali gratia, certa scientia, et mero motu*, do not extend beyond the meaning and intent expressed in them, nor, by any strained construction, make anything pass against the apt and proper, the common and usual signification and intendment of the words of the grant, and passes nothing but what the king owned."

And in the case of *D. & P. R. R. Co. v. Litchfield*, 23 How. 66, 88, in construing a grant of public lands to the State of Iowa to aid in the construction of a railroad, this court says:

"But if we had doubts from any obscurity of the act of congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied."

And in the same case the court quotes with approval the following language of Lord Ellenborough:

"If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public, and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it is clear that it was so intended."

The language above quoted from the case of *D. & P. R. R. Co. vs. Litchfield* is repeated by this court in the case of *Leavenworth R. R. Co. vs. United States*, 92 U. S. 733; and the court adds:

"And if rights claimed under the government be set up

against it, they must be so clearly defined that there can be no question of the purpose of congress to confer them. In other words, what is not given expressly, or by necessary implication, is withheld."

The above cases are peculiarly applicable to the case at bar, because in each of them was the construction placed by this court upon grants of public lands. And the rule of strict construction was vigorously and justly applied.

See also—

Newhall vs. Sanger, 92 U. S. 761.
Ruggles vs. Illinois, 108 U. S. 526.
Wright vs. Nagle, 101 U. S. 791.
Minot vs. R. R. Co., 18 Wall. 206.
Minturn vs. La Rue, 23 How. 435.
Turnpike Co. vs. Illinois, 96 U. S. 63.
N. W. Fertilizing Co. vs. Hyde Park, 97 U. S. 659.
Charles River Bridge vs. Warren Bridge, 11 Pet. 420.
Cooley on Constitutional Limitations (5th ed.), pp. 488, 489 and 490.
Sutherland on Construction of Statutes, sec. 378.

The foregoing rule is peculiarly applicable where it is contended that a legislature has made a grant, not only by implication, but a grant which its power to make was at least doubtful

V.

With respect to this claim on behalf of the plaintiff, it is abundantly established by the authorities heretofore cited, that plaintiff has no rights as riparian or littoral

proprietor by virtue of anything in the constitution or laws of the United States, and the supreme court of the United States has uniformly recognized the power of the states to extend or withhold any privilege or right whatever in the shores and beds of its navigable waters; and any claim or right which plaintiff may have in the premises by virtue of such contention must be based upon the constitution and laws of this state.

But it has been conclusively settled by the supreme court of this state, in the cases of *Eisenbach vs. Hatfield*, 2 Wash. 236 (26 Pac. R. 539), and *Pierce vs. Kennedy*, 2 Wash. 324 (26 Pac. R. 554), that a riparian proprietor has no rights whatever in the shores of navigable waters by virtue of his riparian proprietorship which the state cannot ignore, and in the case of *Yesler vs. Prosser et al.*, 2 Wash. 530 (27 Pac. R. 550), that plaintiff has no cause of complaint under any provision of the constitution or laws of this state for any act complained of herein.

See also *Stimson Mill Co. vs. Commissioners*, 29 Pac. R. 938.

Those cases are *authorities* in this matter. It is too well settled by the decisions of the supreme court of the United States that the construction given by the highest court of a state to its own laws and constitution is absolutely binding, to need the citation of any authorities in its support. It has been so held in scores of cases by this court. One of the latest expressions of this doctrine is to be found in the case of *Hardin vs. Jordan* (*supra*), in which the court says:

"The right of the state to regulate and control the shores of tide waters and the lands under them is the same as that

which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania to all the permanent rivers of the state; but it depends upon the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

In that case the court sought simply to determine what was the law of Illinois, a question on which the court was not unanimous, Justices Brewer, Gray and Brown dissenting as to the law of Illinois. And Justice Brewer, in writing a dissenting opinion, uses the following language:

"Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of the highest court furnish the best and the final authority.

The foregoing authorities would seem to settle the law in this respect so conclusively that any further citation of authorities would be superfluous. But in view of the importance of this question to the people of the State of Washington and the great value of the property involved in this litigation, we trust that the court will not consider it out of place to show briefly the powers exercised over this class of property by the crown and parliament at common law and by numerous of the states of the union.

At common law the title to the shores and beds of navigable waters in England was vested in the crown, and prior to the time of Magna Charta this title was absolute and uncontrolled, but since then has been so far qualified

that the king, without parliamentary sanction, could not make a valid grant of it.

Lewis on Eminent Domain, secs. 77, 85.
Gould on Waters, secs. 21, 93, 167.
Wood's Law of Nuisances (2d ed.), sec. 468.
Pollard's Lessees vs. Hagan, 3 How. 212.
Mayor vs. Eslava, 9 Porter (Ala.), 577.
Mumford vs. Wardell, 6 Wall. 423.
Webber vs. Harbor Commissioners, 18 Wall. 57.
Bell vs. Gough, 3 Zab. (N. J. L.) 624.

No person without the license of the king or parliament could erect any structure whatever below high water mark. If such a structure were erected without a license, and it amounted to an obstruction to navigation, it was a public nuisance, and might be abated by indictment. If it did not amount to an obstruction to navigation, it was a purpresture, and the king could abate, seize or demolish it at his pleasure.

Gould on Waters, secs. *supra.*
Wood's Law of Nuisances, sec. 468.
Thornton vs. Grant, 10 R. I. 477, 480.
Lewis on Eminent Domain, secs. 71, 72.

In short, the foregoing doctrine is supported by so overwhelming a chain of authorities that its discussion seems idle; yet parliament has always had the power to make an absolute grant of the beds of navigable waters to a stranger without regard to any pretended conveniences or rights of the riparian proprietor in front of whom the shore was appropriated by parliamentary authority.

Abraham vs. The Great Northern Railroad, 5 English Law and Equity, 258.

The law applicable to this class of questions is so admirably stated by Mr. Wood, in section 468 of his work on Nuisances, that we feel justified in quoting that section at length:

"The state is the owner absolutely of the alveus of the stream to high water mark, and as such owner may devote the stream, or any part thereof, to such purposes as it sees fit, so long as it does not materially obstruct navigation. Riparian owners, as such, upon this class of streams, have no more rights than any other member of the public, either in the stream or any of the lands covered thereby. They cannot erect a wharf thereon, or use any portion of the alveus of the stream for any purpose whatever, except in the exercise of the common right of navigation. They may cross and recross the same for the purpose of reaching the sea; so may any other member of the public. They may use the waters of the stream for ordinary domestic purposes, and so may any one else. The owner of the bank has no *jus privatum* or special usufructuary interest in the water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the water more readily, and over lands which the public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high water mark, and does not prevent the state from depriving him entirely of this convenience by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is '*damnum absque injuria.*' Thus, the state may authorize the erection of wharves, or the construction of embankments for railroads on the shore of tidal streams, or its

use in any way that does not directly trench on the land itself of the riparian owner."

And Mr. Lewis, in his work on Eminent Domain, at section 85, states the law in the following language:

"Those states which hold the doctrine of the absolute title of the public to public waters, of course, deny any redress for injury to riparian rights, for the reason that they do not recognize the existence of such rights. It has accordingly been held in such states that the waters of a public stream or public pond may be taken to supply a city with water without compensation to the riparian owner. Also, that interfering with a fishery by a wall or wharf, destroying a fording by deepening a public river, the converting of a private wharf into a public one, or the building of public wharves in front of private property, to be owned and controlled by the public, are things which may be done without compensation to the riparian owner."

And we think that an examination of the following authorities will show that every state in the Union which has had occasion to act upon this question has assumed that it had absolute control over the shores and beds of its navigable waters, unrestrained by anything in the federal constitution, or any claim on the part of riparian proprietors which was not based upon the law of the particular state in which the case arose.

In Maine the title of the riparian owner extends to low water mark, by virtue of the colonial ordinance of 1647, and yet the state cuts him off from access to the navigable water by authorizing the construction of a dam across a cove, and between his land and the sea, and declines to allow him any compensation for the alleged injury thus occasioned.

Parker vs. Cutler Mill Dam Co., 20 Me. 353.

It also excludes him from the navigation of the river by granting the monopoly thereof to a stranger, and denies him any compensation for any injury occasioned by the construction of a dam, rendered necessary in the improvement of the river.

Moor vs. Veazie, 31 Me. 360.

The court of that state, in *Parker vs. Cutler Mill Dam Co.*, 20 Me. 357, says:

"The regulation of the navigable waters within the state is vested in the sovereign power, to be exercised by laws duly enacted. The navigation may be impeded, if in the judgment of that power the public good requires it. And if the more apparent object be the profit of a grantee, it is its right and duty to determine whether the public interest is so connected with it as to authorize the grant. To refuse it this right would be to prevent the union of public and private interests for the accomplishment of any object.

"The jury have found that the dam was erected across the head of Little River harbor; the corporation is not therefore liable for any injury which the plaintiff may have suffered by obstructions to the navigation by altering the flux and reflux of the tide. This will embrace the flowing of the beach complained of as an injury to the plaintiff in repairing vessels; the alleged injury to his mill site by retaining the tide water; and the increased difficulty in navigating the river occasioned by the flood gates. * * * The colonial ordinance of 1641 extended the right to the riparian owner in the soil from high to low water mark, where it did not exceed one hundred rods. But this was a qualified right to use the interest granted in such a manner as not to *interrupt the rights of the public, as secured by this ordinance. The right of navigation was expressly reserved. And the right of each householder to have free fishing, so far as the sea ebbs and flows, has been in the same ordinance declared.* It was the policy of the colonial legislatures, instead of granting away any portion of the public right of fishery, to extend and enlarge it."

New Hampshire bases his right below high water mark upon the colonial ordinance of 1647, which, though never adopted as positive law, has obtained the force of law by a long acquiescence and custom.

Clement vs. Burns, 43 N. H. 609, 621.

In Massachusetts his title extends to low water mark by virtue of the colonial ordinance of 1647, and it is held that he only takes to high water mark by virtue of any grant made prior to the passage of that ordinance (*Commonwealth vs. Roxbury*, 9 Gray, 451), and Justice Gray, in his elaborate note to that case, shows that the people of that colony did not pretend to have any right to erect a wharf, or, having erected one, to charge any wharfage, without express authority from the sovereign of that jurisdiction (see notes to same case, p. 514 *et seq.*); in which the learned jurist seems to have made a most elaborate and exhaustive research of the history of the ordinance of 1647, and of the condition of titles prior to that time. He says:

"In the earliest times of the colony, before the passage of any ordinance on the subject, wharves were built by the proprietors of land bounding on the sea, *by the permission or authority of the towns, and with the approval of the general court.* The earliest order of this kind, appearing in the Boston Town Records, is one of January 21, 1638–39, by which 'there is granted to the owners of the wharfe and crayne an hundred acres of land at Mount Woolystone, next to the allotments already granted, toward the repayring and mainteyening of the said wharfe and crayne.'"

1 Boston Town Rec. 27.

On the 25th of May, 1640—

"Mr. Edward Ting is granted to digg turfe of the island

lieing among the flats by the mill feild going to Charlestowne."

1 Boston Town Rec. 45.

On the 6th of October, 1641—

"Francis Willoughby, Edward Tinge and Edward Bendall presented a petition to the general court, representing that they 'have beene att greate costs and charges, to the espense of a greate parte of our estates, in erecting warehouses and framing of wharfes with many other necesearyes, for expeditinge and safe landinge of such commodetyes and goods as come (not onlye from about home, but alsoe) from further partes, expedient and useful according to our hopes and intentions for the publique good,' and praying in court 'to appoynte unto us a certaine rate for wharfage, porterage and howsing of goods; that having your worship's authoretye for our demands and dues in this case by this honored corte provided, we may not (justlye) offends anye by our owne demande.' On this petition the general court appointed a committee 'to settle the rates of wharfage, porterage and warehouse huire, and certify at the next general court, and the order to stand the meanwhile; * * * all their owne goods, wood, timber and other things being originally in this jurisdiction without any charge; and such warehouses or other houses as they shall erect during their terms they shall be allowed for by the towne after such rate as they shall be valued to be their worth, without respect of the place;' and 'such wharfes as they shall make there they shall leave in good repair, and so that they may be of use to the towne at the end of time;' and also 'sufficient wharfe, and from time to time keepe in repaire the creeke next unto George Burden's house fitting for the lading and unlading of lighter of twenty tunne in ordinary tydes on either side thereof.' * * * The legislature may, without compensation, prohibit the taking of gravel from a beach, or building upon flats, whenever in their opinion such prohibition would benefit navigation. * * * The owner of flats has no right, either against the commonwealth or against coterminous proprietors, to have

his flats kept open for the ebb and flow of the tide, either for tide mills or for navigation; but only to the flow of the water below low water mark, and to *some access* thereto."

See also Pub. St. Mass. Ch. 19, 1882.

Massachusetts also holds that it is competent for the authorities of the state to extend a harbor line across flats the title to which is confessedly in the riparian proprietor, by virtue of the colonial ordinance heretofore referred to, and for infringing upon the limitation thus set upon his right to wharf out, punishes him by indictment and fine.

Commonwealth vs. Alger, 7 Cushing, 53.

In Rhode Island his right to extend his possessions by any extraneous additions to the upland is based upon the colonial ordinance of 1701 (*Clement vs. Burns*, *supra*), and by virtue of immemorial usage, long acquiesced in by the people, the legislature and the courts.

Steam Engine Co. vs. Providence Steamship Co., 12 R. I. 348.

Bowden vs. Lewis, 13 R. I. 189.

And the court distinctly asserts the paramount power of the legislature to withhold such privileges if it saw fit (*Thornton vs. Grant*, 10 R. I. 484–486), and still asserts its right to lease the shore in front of the upland owner to a stranger, and punishes him in damages for tearing down a structure erected by such stranger in violation of law, and not for the purpose of commerce.

Clark vs. Peckham, 10 R. I. 35.

Connecticut asserts her right to forbid erections in her harbors, and to license the privilege of charging tolls for the use of private wharves.

Union Wharf Co. vs. Hemingway, 12 Conn. 293.

Statutes regulating New Haven harbor, General Statutes 1888, secs. 3243, 3244 and 3257.

New York utterly repudiates all pretensions of the upland owner, and says he has no greater rights than any other member of the public.

Gould vs. Hudson River R. R., 6 N. Y. 522.

Furmon vs. Mayor, 10 N. Y. 567.

Revised Statutes, pp. 2252, 2281, 2282.

Langdon vs. The Mayor, 93 N. Y. 129.

New Jersey asserts her power to require the riparian owner to purchase the privilege of constructing a wharf, or any other addition to his uplands, and asserts the right to grant the same to a stranger, in case he does not see fit to avail himself of his permissive right (*Stevens vs. Paterson & Newark R. R. Co.*, 5 Vroom [34 N. J. L.] 532), and the supreme court of the United States distinctly recognizes her power to do so.

Hoboken vs. R. R. Co., 124 U. S. 656.

Section 15, Revision 1887, p. 66; also secs. 1–14.

See also, N. J. Revision of 1877, p. 980.

Delaware erects a dam across a navigable arm of the sea, in which the tide ebbs and flows, without reference to the

right of access of the riparian proprietor, and the supreme court of the United States recognizes the validity of her acts.

Willson vs. Blackbird Creek Marsh Co., 2 Pet. 245.

Pennsylvania, while admitting that by the law of that state the riparian owner owns the shore to low water mark, denies him any right to erect any kind of a structure below the line of ordinary high tide without express authority from the state, or having erected a structure, to charge any tolls for its own use by a stranger unless authorized by the state to do so.

Tinicum Fishing Co. vs. Carter, 61 Pa. St. 21.
Rundle vs. D. & R. Canal Co., 14 How. 80, 93.

Virginia deemed it necessary to make an express legislative grant, to enable the riparian owner to construct a wharf in front of his own land (*Ravenswood vs. Fleming*, 22 W. Va., 52; 46 American Reports, 497), and has always asserted the right to exercise her sovereign control over the beds, shores and banks of all navigable waters, even to the extent of prohibiting a riparian proprietor to take an oyster from the shore in front of him unless he is a citizen of the state.

McCready vs. Virginia, 94 U. S. 391.

West Virginia utterly repudiates the pretensions of the riparian owner, and in support of the public policy demanding that construction of law, the supreme court, in

Ravenswood vs. Fleming, 46 American Reports, *supra*, on page 499, says:

"We have seen that the Ohio river is a public highway, and according to the overwhelming weight of authority, according to the statutes and decisions of the State of Virginia, the riparian owners of land on its banks have no title as against the state beyond ordinary high water mark, and that the title to the bed, the shores and banks to ordinary high water mark is now in the State of West Virginia for the use of the public. The conclusion is absolutely necessary to properly preserve for the people the free navigation of that great highway. If each riparian owner had the right to build a wharf of his own, and to deny the right of any one to land there without paying tribute to him, or to deny him the right to land at all on land adjacent to his farm or lot, the navigation of the river could not in any sense be free."

South Carolina, by her constitution, art. 1, sec. 40, declares that—

"No * * * wharfage shall be imposed, demanded or received for the use of the shores or any *wharf erected* on the shores, or in or over the waters of any navigable stream, unless the same be authorized by the general assembly." (Const. 1882.)

And her courts (*Fuller vs. Edings et al.*, 11 Rich. [S. C.] 239), under a statute providing compensation "for the value of the premises taken for public use as well as for the *damages generally to the same*," held that the riparian owner whose land was taken for a public wharf was not entitled to compensation for the damages he might sustain for the loss of income from his private wharf.

Florida in 1856 deemed it necessary to pass an act, the preamble of which is as follows:

"Whereas, it is the benefit of commerce that wharves be built and warehouses erected for facilitating the landing and storing of goods; and whereas, *the state being the proprietor of all submerged lands and water privileges within its boundaries which prevent the riparian owner from improving their water lots, therefore, etc.*"

Could any more emphatic declaration of the absolute power and control of the state over the shores of its navigable waters be made by the people, through their legislative representatives, than this?

Alabama holds that even the United States has no power to make a grant of any interest in the shore of the ocean.

Mayor vs. Eslava, 9 Porter, 577, *supra.*

And that state (Alabama), by her constitution, adopted in 1875, sec. 25, art. 1, declared in her bill of rights as follows:

"No tax, toll, impost of *wharfage*, shall be demanded or received from the owners of any merchandise or commodity for the use of the shores or any *wharf erected* on the shores or in or over the waters of any navigable stream, unless the same be expressly authorized by law."

And the supreme court of the United States, in *Pollard's Lessees vs. Hagan*, commend the good sense of the Alabama court; and in *Barney vs. Keokuk* express a distinct approval of the stern assertion of public rights by the supreme court of the state of Iowa in repudiating the pretensions of the riparian owner.

Mississippi asserts her absolute jurisdiction over the shores of her tide waters, to the exclusion of any claim of the riparian proprietor, by authorizing a municipal corporation to take entire control of the water front; and pursuant to authority derived from such corporation, the courts maintain the right of a license of the municipality to build a wharf in front of the upland of another without his consent and against his objections.

Martin vs. O'Brien, 34 Miss. 21.

Louisiana, while apparently acquiescing tacitly in the building of a wharf by the riparian proprietor, declines to consider him in any way damaged by the conversion of his private wharf into a public one, and asserts that the shores of the Mississippi belong to all the people and not to individuals, and that it is the duty of the public to take possession of all the shores whenever the public demands require it.

Hart vs. The Mayor, 10 La. Annual, 171.

The court says, on page 173:

"It is impossible to perceive upon what grounds the action of the town council can be made the foundation of the claim for damages against them. It is true they did not object to the erection of the plaintiff's wharf; but this did not give to the latter the exclusive use of the bank of the river covered by their wharf. *The banks of the Mississippi river are public property, subject to be used indiscriminately by the public at large.*"

The constitution of Texas, art. 1, sec. 17, p. 504, is as follows:

"No person's property shall be taken, *damaged* or destroyed for or applied to public use without adequate compensation," etc.

By her laws, sec. 4436, Sayles Stat. 1889, she gives the riparian proprietor preference right to operate a ferry, but prohibits him charging any tolls unless he has license so to do (sec. 4437). And regulates his charges (sec. 4440). And if he declines to operate the ferry at reduced rates, she gives the license to any one who will take it (sec. 4442).

See also *Galveston vs. Menard*, 23 Texas, 349.

California assumes absolute and complete control over all her shores and navigable waters, and asserts her power and right to grant the privilege of erecting a wharf to a stranger in front of property owned by a third person (see sec. 2906, Deering's Political Code, and following sections), and clearly indicates, in section 2917, that where the riparian proprietor has erected a wharf, even with a license from the state, he has no power to collect any wharfage, excepting by a further license under authority of the legislature. The validity of this law is expressly affirmed in *Templeton vs. Coburn*, 48 Cal. 563. True, California has licensed riparian owners to build wharves under certain restrictions, excepting in front of the city of San Francisco, but this, instead of being an argument in favor of the right at common law, is conclusive evidence that it does not exist. The supreme court of that state, in *People vs. Davidson*, 30 Cal. 393, after setting forth the power of the king at common law to seize or demolish a purpresture, says: "The state, in case of mere purpresture, has the same power in

respect to its tide lands." Again, in the case of *Coburn vs. Ames*, decided by that court in 1877 (52 Cal. 397), the court says:

"It is well settled in England that the *title* in the bed of the ocean is in the sovereign subject to the *jus publicum* the right of navigation and fishery. * * * If the soil in this case belongs to the state — and such is the theory of the bill — then the wharf, if erected, will belong to it also. The defendants will be unable to collect wharfage, and will have no rights except those belonging to the public at large. Possession of the land and wharf, should it be withheld, can be recovered in ejectment, and thereafter the wharf can be managed by the state according to its own views of public good."

And while, as before said, the riparian owner is authorized by positive law in California to wharf out, providing he does not interfere with navigation, the court holds that he cannot prevent a stranger from so doing if he does not see fit to construct a wharf himself, and in this connection the court says, p. 398:

"In this state there are numerous large landed estates, held in private ownership, which front for many miles on the shore of the ocean, and on navigable bays and inlets within the ebb and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers and wharves which are necessary for the convenience of commerce, nevertheless, in virtue merely of his riparian rights, might maintain ejectments for all such structures erected by others, which, when recovered, he might either demolish or cease to use in aid of commerce, it is not difficult to foresee the disastrous consequences which would result from such a doctrine. It results from these views that the court below erred in including, in the judgment for the plaintiff the wharf and chute below high water mark."

The case of *Shirley vs. Bishop*, 67 Cal. 543, is cited as a modification of this doctrine, but it appears that in that

case the plaintiff's right was founded upon express license by positive law. From this it seems that California, like all the other states, had the full power to make such laws as it deemed fit, and the State of Washington has the same power as the State of California.

Oregon asserts the absolute proprietorship of the state to the shores and beds of her navigable waters (*Hinman vs. Warner, supra*), and authorizes the construction of a bridge across a navigable stream against the protest of persons owning wharves above such structure.

Willamette Bridge Co. vs. Hatch, 125 U. S. 1.

In Iowa it is held that the state is the absolute owner of the shores and beds of her navigable rivers below the line of ordinary high water mark; and she recognizes no right in the riparian proprietor in such shores and beds different from that of any other person excepting as his right proceeds from a statute of the state.

McManus vs. Carmichael, 3 Iowa, 1.
Tomlin vs. R. R. Co., 32 Iowa, 106.
Barney vs. Keokuk, supra.

In Wisconsin the riparian proprietor is the owner of the bed of the stream contiguous to his uplands to the middle thread thereof, but the courts of that state uphold the power of the legislature to cut a riparian proprietor off from access to the navigable waters of the stream by authorizing a corporation to construct an impassable boom

in front of him (*Cohn vs. Wassau Boom Co.*, 47 Wis. 314), and by changing the channel of a river so that his access is entirely destroyed.

B. R. Improvement Co. vs. L., B. & T. Co., 54 Wis. 659.

It will thus be seen that the right of access in the riparian proprietor as against the authority of the state has been expressly denied by Maine, New York, Delaware, Pennsylvania, Mississippi, Iowa, Wisconsin and California; and that his right to wharf out excepting as authorized by state legislation has been expressly denied by all of the states above mentioned.

VI.

The claim that plaintiff has a preference right to purchase the area covered by its improvements was necessarily involved in the case of *Yesler vs. Prosser et al.* (*supra*), but the court did not deem it of sufficient importance to deserve mention. It will, however, be noticed that the harbor line commissioners in this case are exercising the powers conferred by and performing duties enjoined in the constitution of the state, and if any subsequent law passed by the legislature in any way conflicts with these constitutional provisions, it goes without saying that the law must yield to the constitution. In this case, however, the appellants contend that the plaintiff can insist on no rights based on the law heretofore quoted, for the reason that that law only authorizes the sale to the riparian owners of "*tide lands*," and the bill filed by the plaintiff herein nowhere

sets forth any facts from which it can be inferred that any of the area between the harbor line and the line indicating the width of the reserved area is "*tide lands.*"

The term "tide lands" was unknown to the law until used by the legislature of the State of California in the act of 1861. And subsequently to that date, in October, 1866, the supreme court of the State of California defined the term "tide lands" as synonymous with the word "shore," and held that the phrase only included the area which lay between the line of high tide and the line of low tide.

See *People vs. Davidson*, 30 Cal. 379.

This term, having been borrowed from the law of California subsequently to the date of its construction by the supreme court of that state, must be deemed to have been used by the legislature of the State of Washington in the same sense and with the same meaning that it acquired by judicial construction in the state from which the phrase was borrowed. Indeed, the same legislature which enacted the provision heretofore quoted defined the term "tide lands" in section 6 of the act of March 28, 1890, providing for public ways across tide flats near towns.

See Laws of 1889–90, page 372.

That section is as follows:

"Where the words 'tide flats' or 'tide lands' are used in this act they shall be construed to mean all lands over which the tide ebbs and flows, and which is bare at low tide," etc.

The plaintiff having failed to show that any of the area in dispute is of the character which the law authorizes the riparian or littoral proprietor to purchase, can maintain no rights in this action by virtue of any provision of that law.

It has been further alleged by the plaintiff that the action of the harbor line commissioners in this case is an invasion of the rights guaranteed to the citizen by the fourteenth amendment to the constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law; and it is contended that compensation for private property taken for public use is a necessary ingredient of due process of law; and the case of *Scott vs. Toledo*, 36 Fed. R. 385, is relied on to sustain this position. The learned judge who decided that case does use language which could be construed to sustain that contention, but when this amendment to the constitution is construed in connection with the fifth amendment, and the interpretation placed upon those two amendments by this court, we contend that such a conclusion cannot be reached. When the states adopted the Fifth amendment, which was designed to impose limitations upon the power of the general government, it used the following language:

"No person shall * * * be deprived of life, liberty or property without due process of law, *nor shall private property be taken for public use without just compensation.*"

The framers of this section, and the states which adopted it, evidently understood that the limitations upon the power of the general government to deprive a citizen of life, liberty or property without due process of law did not amount to a guaranty that private property should not be taken for public use without compensation; otherwise, the last clause in that amendment would have been entirely superfluous and the former words would have been suffi-

cient to satisfy the apprehensions of the several states. When the fourteenth amendment was adopted by the several states, the fifth amendment was before them, and it must be presumed that the framers of the latter article were familiar with the former. They were willing to limit the power of the states by providing that no state shall deprive any person of life, liberty or property without due process of law, but they declined to follow the fifth amendment further and say that private property shall not be taken by the state for public use without compensation. Again, the word "property" in the fourteenth amendment is used in connection with the words "life" and "liberty," and the state is prohibited from depriving any person of life, liberty or property without due process of law. And the conclusion is irresistible that the states, in adopting this amendment, intended to throw the same safeguards and only the same safeguards about property that they did about life and liberty. And if compensation can be held to be a part of due process of law without which property cannot be taken by the states, how can we fail to reach the conclusion that life and liberty are equally protected, and that a state cannot deprive an individual of either one without just compensation; a conclusion which, to say the least, would be absurd.

This question was also considered by the supreme court of the State of Washington in the case of *Yesler vs. Prosser et al.*, *supra*, and it was held that the acts of the harbor line commissioners did not *deprive* the plaintiff of any property, and that the plaintiff did not have any rights, interest or property in his improvements on the shore of the waters of the state which was capable of being clouded

by any act of the harbor line commissioners. But if the plaintiff had all the rights, title and property in the area in dispute which it claims, and the acts of the harbor line commissioners amounted to *depriving* the plaintiff of its property, it is impossible to see how the acts of the harbor line commissioners are wanting in any element essential to *due process of law*. The constitution and the laws under which they acted were duly enacted long before the first step was taken towards locating a harbor line in front of the city of Tacoma. This constitution and these laws affected all persons and all property similarly situated, in exactly the same manner; and so far as the laying of the harbor lines and the defining of the reserved area is concerned, it is not pretended but that the commissioners are acting strictly in pursuance of the constitution and the laws. And the provision of the fourteenth amendment upon which the plaintiff relies, was only intended to prohibit the state from depriving any person of life, liberty or property, excepting through the operation of laws theretofore ascertained and which operate upon all persons similarly situated, in the same manner. In the case of *Walker vs. Sauvinet*, 92 U. S. 90, the court says:

"Due process of law is process due according to the law of the land. This process in the state is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the constitution, and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States."

The fourteenth amendment was not designed to define due process of law, nor to add to or take from its ordi-

narily accepted meaning any qualification or limitation. If there was any other provision of the federal constitution prohibiting any state from taking private property for public use without compensation, then it might logically be contended that due process of law required compensation to be made for private property taken for public use. But this is not the case. The fifth amendment, guaranteeing to the citizen that private property shall not be taken for public use except upon just compensation, only applies to the United States, and not to the states.

Barron vs. Baltimore, 7 Pet. 243.
Holmes vs. Jennison, 14 Pet. 540, 582.
Fox vs. Otis, 5 How. 410, 434.
Smith vs. Maryland, 18 How. 71, 76.
Withers vs. Buckley, 20 How. 84, 90.
Pervear vs. Mass., 5 Wall. 475, 479.
U. S. vs. Cruikshank, 92 U. S. 542, 552.
Presser vs. Ill., 116 U. S. 252, 265.

The fourteenth amendment was not intended to in any way limit or impair the power of any state to deprive a person of life, liberty or property, but only to guarantee to the citizen that he should not be deprived of life, liberty or property except in pursuance of the law of the state. It does not extend to the citizen any new right, nor impair any right which he had heretofore. Nor does it guarantee to him that he shall not be deprived of any right which he now has by the state, but simply specifies in general terms the manner in which it must be done. It cannot be done capriciously; it cannot be done wantonly; it cannot be done by the exercise of the powers of the state

acting without the sanction of its laws. Its main purpose was to protect the newly emancipated slave, and to enable him to appeal to the federal courts for redress when the state sought to deprive him of life, liberty or property, not in pursuance of the law of the state, but in violation of it. In the case of *United States vs. Cruikshank*, *supra*, this court says:

"The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society, * * * and secures the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

See also Miller on the Constitution, p. 664, *et seq.*

Prior to the adoption of the fourteenth amendment, the state had full power to deprive a citizen of property without compensation (*Barron vs. Baltimore*, *supra*), except as it was restrained by its own constitution. And the only change made in the status of the state by that amendment is, that while prior to its adoption the state might deprive him of his property without compensation and without due process of law, it can now deprive him of property only in pursuance of laws duly enacted and in accordance with the usual form of procedure. It is not pretended that the acts of the harbor line commissioners in this case do not fully comply with these latter limitations.

In the case of *Scott vs. Toledo* (*supra*), it will be noticed that the constitution of the State of Ohio provides that

compensation for property appropriated to public use must be first made in money, or first secured by deposit of money, and that it shall be assessed by a jury, without deductions for benefit to the property of the owner, and further provides that—

"No right-of-way shall be appropriated to the use of any corporation until full compensation therefor has been made in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law."

In that case the city of Toledo sought to take the property of the plaintiff for a public street, not in accordance with the constitution of that state, but in direct violation of its provisions, and it is wholly unnecessary to question the correctness of the decision of the learned judge who decided that case, in holding that due process of law in the State of Ohio required compensation to be first made for property appropriated to public use. In that case there was no question but that the city of Toledo sought to "*deprive*" the plaintiff of his property, and in holding that the constitution of the State of Ohio prohibited the taking of property in the manner sought to be pursued by the city of Toledo, the learned judge did not ignore or disregard any decision of the supreme court of that state, construing its own constitution and laws. What is subsequently said by the court in that case with reference to the restraining influence of the fourteenth amendment, generally, was wholly unnecessary to the decision of the cause, and was not really involved in the case. His argument on

this branch of the case can be regarded only as *dicta*, and entitled to no greater respect as authority than the opinion of any other eminent lawyer. And the conclusion which he reaches is certainly not in harmony with the definition of "due process of law" as given by that eminent jurist, the late lamented Judge Miller, on page 664 of his valuable work on the constitution, in which he defines it as follows:

> "Law, in its regular course of administration through the courts of law, is due process of law, and when it is secured by the law of the state the requirements of the fourteenth amendment are satisfied. Due process of law, within the meaning of that amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In the present case, however, it is difficult to see on what theory the plaintiff can consistently claim that the action of the harbor line commissioners in locating the harbor line and filing the plat in any way prejudices or injuriously affects any of its rights, privileges, properties or franchises, even conceding that it has all the rights and property in the area in dispute that it claims. Or even if it should be held that the plaintiff is the absolute owner of all that area, and that the state has no interest whatever in the shores and beds of its navigable waters, the harbor line which the defendants have located, and it is the only line which they have attempted to locate, or which the law authorizes them to locate, is entirely in the navigable waters of the city of Tacoma, and does not even touch any improvements whatever which the plaintiff has erected or maintains. Its design, as outlined by the constitution, is

simply to prohibit the unreasonable encroachment by private individuals and corporations on the navigable waters of the harbor, and to secure a uniform water front, so that commerce may have the full benefit of all the wharves erected to accommodate traffic.

From the authorities heretofore cited it is seen that nearly every state in the union having any tide water harbors, and some states which do not have tide water harbors, have located such lines and compelled the proprietors of wharves to comply with their regulations. The location of such lines is manifestly an exercise of the police power of the state, the design of which is to benefit the entire public.

There is no pretense that the defendants have threatened in any manner to disturb plaintiff, even in its possession of the property of the state, nor do all the allegations of the complaint taken together state any fact from which it can be inferred that the action of the defendants will have a tendency to produce that effect, or that any of the defendants have any such intention whatever.

Great stress, however, is laid by the plaintiff upon the fact that when the harbor line is located a strip inside of the harbor line will, by the terms of the constitution, acting in conjunction with the order of the board of harbor line commissioners, defining its width, be reserved from sale. One of the contentions of plaintiff is, that by the laws of the state it will have a right to purchase the shore in front of its littoral holdings. If the legislature has the power to authorize the sale of a part of the shores of its navigable waters, have not the people of the state, through

its constitution, the power to reserve another portion from sale? This contention is directed against the order of the commissioners fixing the width of the reserved area, rather than against their act in locating the harbor line. And these two acts have no necessary connection with each other. For all that appears in the law or the constitution, the harbor line commissioners might have determined the width of the reserved area long after the location of the harbor line. The inner line, of which plaintiff complains and alleges that it crosses improvements of the plaintiff, is not a harbor line, nor is it any line required by the constitution or laws to be placed upon the plat by the commissioners. It merely indicates, approximately, where the engineer who made the plat thinks the inner line of the reserved area will be. And it is inconceivable how the making of this mark upon the plat can in any way affect any right or interest of the plaintiff, even assuming that the plaintiff has any right or interest in the premises in dispute.

VII.

The plaintiff alleges one other ground of complaint against the action of the defendants, namely: That they have caused a water way to be located in the harbor, the outer end of which is not in water of the depth of twenty feet at low tide, as required by the law authorizing the location of such water ways. The complaint, however, fails to disclose what the depth of the water is at the outer end of this water way, and the court will therefore presume that it is substantially the depth required by law. But if

this were not true, we contend that it furnishes no ground for interference by the plaintiff with the action of this commission. It is not material to the plaintiff whether the water at the outer end of this water way is twenty feet deep or two feet deep at low tide. Plaintiff is not the guardian of the people of the State of Washington, nor the conservator of their interests. The people have wisely chosen other representatives than the plaintiff to guard their interests and to hold their agents and officers to the proper discharge of their duties. And so long as the people, through their proper representatives, do not complain of the action of these defendants, we contend that the plaintiff cannot usurp their functions nor perform their duties.

If it be held that the state, in the exercise of its sovereign authority and the porformance of its duties as the guardian of the interests of all the people, can be prevented by private individuals or corporations from regulating the use of its own shores, which are confessedly its own property, it is difficult to conceive what right, power or authority is left in the state to manage its own affairs and protect its own property for the benefit of the public at large.

Respectfully submitted.

W. C. JONES,
Attorney General.

WILLIAM LAIR HILL, *of Counsel.*

William Lair Hill

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1202.

W. F. PROSSER et al., as Members of the Board of Harbor Line Commissioners,

Appellants,

vs.

NORTHERN PACIFIC R. R. CO.,

Appellee.

Appeal from the Circuit Court of the United States for the District of Washington.

BRIEF FOR APPELLEE.

JAMES McNAUGHT,
A. H. GARLAND,
For Appellee.

LIVINGSTON MIDDLEDITCH CO., Printers, 149-153 Leonard St., N. Y.

In the Supreme Court of the United States.

W. F. PROSSER and others,
Appellants,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

No. 1908.

Appeal from the Circuit Court of the United States for the District of Washington.

BRIEF FOR APPELLEE.

The appellee filed its complaint against appellants in the court below for an injunction to prevent them from proceeding as *the board of harbor line commissioners*, under the laws of Washington, to do certain things in violation of appellee's rights, as well as to the great damage of appellee, and for which, if completed and executed fully, there was and could be no remedy at law. A temporary injunction was granted as asked, and appellants appeared and demurred to the complaint,

because by the showing in the complaint, appellee was not entitled to the relief prayed for or any part thereof against appellants or any of them. (Rec. 21.)

The demurrer, after hearing by the court thereon being had, was overruled, and appellants, losing no faith whatever in the virtue and merit of the demurrer, stood fast on it and declined to answer; and the court granted the relief sought by the complaint, and made the injunction perpetual, and from this decree the harbor line commissioners appealed to this court. (Rec. 22–23.)

From the assignment of errors (Rec. 24) the question is simply, did appellee make out a case for the relief asked by it, and granted by the court below?

As the whole struggle rests then upon the strength and sufficiency of the complaint, every fact well pleaded therein being admitted by the demurrer, it is deemed best to set out the complaint in full here, as it appears in the record, p. 3–20, which reads thus:

To the judges of the circuit court of the United States for the western division of the district of Washington, in the ninth judicial circuit:

The Northern Pacific Railroad Company, a corporation created and existing under the laws of the United States, brings this its amended and supplemental bill (leave of court having been

first obtained) against W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commission of the State of Washington; George Haskin, city clerk of the city of Tacoma, State of Washington, and——Smythe, his successor as city clerk of said city, and Allen Weir, secretary of state for the State of Washington, citizens of the State of Washington; and thereupon your orator complains and alleges—

First. That the plaintiff is a corporation duly created, organized and existing under and by virtue of an act of Congress approved July 2d, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts supplementary thereto and amendatory thereof.

Second. That by section 2 of said act there was and is granted to the said plaintiff a right of way in language as follows, to wit: "And *be it* further enacted, That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railway Company,' its successors and assigns, for the construction of a railroad and telegraph proposed, and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations."

Third. That by the first section of said act of Congress it is provided, among other things, as follows: "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth."

That by the fifth section of said act it was provided, among other things, as follows: "And be it further enacted, That said 'Northern Pacific railroad' shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gu*a*ge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line."

That section 11 of said act provides as follows: "And be it further enacted, That said

'Northern Pacific railroad,' or any part thereof, shall be a post route and a military road, subject to the use of the United States for postal, naval and all other government service, and also subject to such regulations as Congress may impose restricting charges for such government transportation."

That by the 12th section of said act it was provided as follows: "And be it further enacted, that the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States."

That also by said act there was granted to said plaintiff every alternate section of the public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States and ten alternate sections per mile on each side of said railroad whenever it passes through any State and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

That section 3 of said act by which said grant of lands is made states the object and purposes of said grant to be as follows: "For the purpose of aiding in the construction of said railroad

and telegraph line to the Pacific coast, and to secure safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway."

That congress also by said act reserved the right to at any time add to, alter, or amend or repeal said act, having due regard for the rights of plaintiff.

That section 20 of said act by which said reservation is made stated the objects and purposes of said reservation as follows: "That the better to accomplish the object of this act, namely to promote the public interests and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the goverment at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes."

That said act of congress was amended by a subsequent joint resolution of congress, approved May 31st, 1870, entitled "Resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road, and to secure the same by mortgage, and for other purposes."

That this resolution provided, among other things, the following: "And also to locate and and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget sound, by way of the valley of the Columbia river, with the right to locate and construct its branch from some covenient point on its main line across the Cascade mountains to Puget sound."

Fourth. That after the passage of said act and prior to March 9th, 1865, the plaintiff determin-

ed upon and selected the general route of the main line of its road from Lake Superior to Puget sound, and of its branch by way of the Columbia river, to Portland, Oregon; that on the said 9th day of March, 1865, the plaintiff duly signed in writing, under its corporate seal, executed as required by the provisions of section 12 of this act, its acceptance of the terms, conditions, and impositions of said act, and thereupon caused the same to be served upon the President of the United States, and therewith presented and filed with the Secretary of the Interior, in general land office of the United States, a map showing the general route of its main line from Lake Superior to Puget sound, with its branch, by way of the Columbia river, to Portland, Oregon; that the line designated upon the said map was by said map duly represented as the general route proposed by the plaintiff as its main line and branch line respectively between the points designated in said act of congress.

Fifth. That the general route selected and determined by said company for its main line as aforesaid and the line of general route designated upon said map as the general route of its main line between the points mentioned in said act was located and run and was designated upon said map as being located and run by way of the valley of the Columbia river to Puget sound, and lay and was represented as lying north of the 45th degree of latitude, and said general route as so determined upon and selected and as designated by said map was on a line north of the 45th degree of latitude as provided by said act; that said general route as so determined upon and selected and as designated by said map was and is the most eligible railroad route for the main line of said railroad and telegraph

line from Lake Superior to Puget sound, and was at the time aforesaid selected and determined upon as such.

Sixth. That many years prior to November 11th, 1889, and while the state of Washington was still a territory, plaintiff's main line of railroad and telegraph was constructed and fully completed in pursuance of the provisions of said act between the city of Portland, in the state of Oregon, and the city of Tacoma, in this state, and has been in operation and maintained by said plaintiff between said points ever since its completion continuously to the present time; that the said main line of road as so constructed and operated is by way of the valley of the Columbia river to Puget sound and upon and by way of the general route as selected and determined upon by the plaintiff in the year 1865 as aforesaid.

That said main line of said railroad of plaintiff as so constructed, completed, and operated in pursuance of said act extended and now extends to the eastern boundary line of what is known as the Tacoma Mill Company's property, at ar near the cove which has been for years and now is used by said mill company as a log pond; which said point of termination of said line of railroad is situated upon Commencement bay, an arm or indentation of Admiralty inlet, near to and east of a point where the waters of Puget sound empty into or join the waters of said Admiralty inlet; which said point of termination of said line of railroad is upon and within the harbor of the city of Tacoma,

That the red line drawn on the map hereto annexed, and marked Exhibit "A," shows the main line of said railroad, as the same extends from 15th street, in the said city of Tacoma,

along the front of said city, to the point of termination aforesaid: that the green-colored space of width in the centre of which said red line is located represents the right of way of said plaintiff, granted by said act of Congress, being two hundred feet in width on each side of the center of said main line; that at the time said act of Congress of July 2, 1864, was passed and approved, all of the land over which said main line of said plaintiff's railroad now extends from 15th street, in the city of Tacoma, to the point of termination, at or near the waters of Puget Sound, as aforesaid, were public lands of the United States, and all of the space included within 200 feet on either side of the said line between said points was a part of the public domain, subject to no rights save those of the United States and those at that date granted to this plaintiff by said act of Congress.

Seventh. That in addition to the lands and part of the public domain included within said right of way between said points, the plaintiff is the owner in fee simple and entitled to and in the possession of all the land lying between the inner boundary line of said right of way and the platted portion of said city of Tacoma situated between 15th street, in said city of Tacoma, and the point of termination of said line of railroad hereinbefore mentioned, and was such owner in fee simple of all of said land for many years prior to November 11, 1889, and has been such owner continuously ever since to the present time; that said land has not nor has any part of it ever been platted into lots and blocks; that so much of said land as extends from South Seventh street to the eastern boundary line of the Tacoma Mill Company's property is more particularly bounded and described as follows:

"Beginning at a point where the west boundary line of the right of way of the Northern Pacific railroad (this line being west of and 200 feet distant from and parallel with the centre of the main line of said railroad) intersects the north line of South Seventh street of the city of New Tacoma, Pierce county, Washington, thence running westerly on the north line of said South 7th street to its intersection with the east line of Pacific avenue, 150 feet, more or less; thence northwesterly on the east line of said Pacific avenue to a point on said east line 300 feet, more or less; thence westerly across Pacific avenue to a point where the north line of South Seventh street intersects the east line of Cliff avenue; thence in a general northerly and northwesterly course with the east line of Cliff avenue to the north line of E street, 4,110 feet, more or less; thence northwesterly on said north line of E street, opposite to block 3210, to the east line of said Cliff avenue, 213 feet, more or less; thence in a northerly and northwesterly course with the east line of Cliff avenue to a point diagonally opposite to the northerly corner of block 2804, 2,715 feet, more or less; thence northwesterly on a line coinciding with that part of said east line of Cliff avenue, opposite to blocks 3604, 3,704 and 3804, produced 541 feet more or less; to a point on the north line of section 32, town. 21 north, range 3 east, this point being 1,150 feet east of the northwest corner of said section; thence east on the north line of said section to the southeast corner of the Tacoma Mill Company's property to its intersection with the west boundary line of the right of way of the Northern Pacific railroad, 170 feet more or less; thence southerly and southeasterly with said west boundary line of said right of way 200 feet distant from, and parallel with, the center

of the main line of the Northern Pacific railroad to the point of beginning, 7,600 feet, more or less, containing $37\frac{74}{100}$ acres, excepting therefrom Pacific avenue, being a strip of land containing $1\frac{40}{100}$ acres, more or less, and leaving $36\frac{34}{100}$ acres, more or less, all of the same being upon the harbor front of the city of Tacoma, in the county of Pierce, State of Washington."

Eighth. That said right of way abuts on the shore of Commencement bay and the line of high tide thereof, and the said above described lands abut upon the said right of way and upon said shore and the line of high tide thereof; that the plaintiff is also the owner of the littoral and riparian rights, rights of access to deep water, and preference rights of purchase of the tide lands pertaining or belonging to the said lands; that said right of way and said lands are chiefly valuable for their right of access to deep water and the right to construct landings and warehouses upon the same northward and westward to the navigable waters of Commencement bay; that many years prior to November 11, 1889, plaintiff constructed and built upon the lands included within said right of way and westward and northward thereof into deep water and the navigable water of said Commencement bay wharves, upon which are constructed, in addition to the tracks, switches, turnouts, side tracks, spur tracks, station buildings and freight-houses, and the terminal facilities of its railroad; also warehouses for the accommodation of general commerce and shipping by water, coal bunkers for the accommodation of loading coal into ships and to facilitate the shipment thereof by water, wheat warehouses and grain elevators for the accommodation of the loading of ships with wheat and other grain, and to facilitate the shipment

thereof by water; all of which were constructed for the accommodation of commerce and for the loading of ships and to facilitate navigation and all classes of shipment by water, and ever since has continuously maintained and does now maintain and use the same for the benefit of trade, commerce, and navigation; that the land hereinbefore described is situated between said plaintiff's right of way and the platted portion of the city of Tacoma, and consists of a high, steep, abrupt bluff, over or across which a railroad could not be properly or safely built; that a railroad built over or across the same would not be practicable to operate so as to reach out and connect with the shipping by water on Commencement bay; that the space included within the right-of-way limits designated upon the map here to attached is the only space between the said bluff and the waters of Commencement bay upon which the tracks, station buildings, and terminal facilities of said plaintiff's railroad could be located and the only space within the city of Tacoma where said plaintiff could establish such facilities as are necessary to make possible and facilitate trans-shipment from rail to vessel and from vessel to rail; that the general warehouses, coal bunkers, and wheat and grain warehouses built and constructed along said harbor front upon and extending outward from said right of way and said abutting lands are also necessary adjuncts to the proper operating of said railroad and necessary to aid in and facilitate the said transhipment from rail to vessel and from vessel to rail; that the map hereto attached marked "Exhibit A" shows said warehouses and coal bunkers and the wharves on which they are constructed or of which they are a part, as well as the passenger depots, freight-houses, station buildings, and other terminal facilities of said

plaintiff's railroad, including main track, side track, turnouts, switches, and spur tracks, and all other facilities which were found necessary to be constructed upon and along said water front in the operation of said plaintiff's business as a common carrier; that the point on Commencement bay, where the plaintiff's line of railroad first reaches a place on the harbor front of the city of Tacoma, where transhipment can be made from rail to vessel and from vessel to rail is at a place on plaintiff's line about opposite South Second street or a point which would be intersected by South Second street extended; that said point is about the first point reached on the line of plaintiff's railroad going westward towards the waters of Puget sound where water can be found of sufficient depth to accommodate the navigation of deep-water vessels, and that all of the space included within said right of way of plaintiff between said point and the point of termination of said plaintiff's line is required for the accommodation of the terminal facilities necessary in the use and operation of plaintiff's said railroad.

That the said buildings, warehouses, and other facilities were constructed at an expense of several millions of dollars; that ever since said wharves, warehouses, buildings, and other facilities were so built and constructed they have been maintained and used for the purpose of trade, commerce, and business, and to aid and facilitate navigation as well as the operation of plaintiff's railroad; that the same have ever since the first construction thereof been of great benefit and assistance in building up the business and commerce of the city of Tacoma, as well as that of the entire State of Washington, and have been a source of revenue and profit to the plaintiff; that without them the plaintiff could

not have performed the public services which under said act of Congress are imposed on it and could not have successfully or properly carried on the public business delegated to it by said act of Congress; that for the public welfare and for the proper establishment and maintenance of commerce and navigation it was and is necessary that these facilities, buildings, wharves, warehouses, should be constructed and maintained upon and along said water front and should be used and continue to be used by plaintiff in connection with the operation of its said railroad.

That when plaintiff's line of railroad was originally constructed along the harbor front in the city of Tacoma, ready for operation, so much of it as extended over lands lying below or outside of the line of extreme high tide was built upon trestles constructed upon piles driven for the support thereof; that all the spurs, side tracks, switches, turnouts, buildings, wharves, warehouses, and other improvements built out over or extending upon lands lying below or outside of the line of extreme high tide were upon said trestles constructed as aforesaid; that all of the space covered by such portions of said line of road, tracks, buildings, and improvements extending between South 15th street and what is known as Brown's wharf has been since the original construction of said lines of road and was long prior to November 11, 1889, the date when said Territory of Washington was admitted as a State of the Union by the adoption of the State constitution, filled in with earth, rock, and gravel and made firm, solid ground, the said tracks, buildings, and other improvements and facilities resting thereon and being supported thereby, instead of upon the piling and trestles which were removed at the time of the making of said solid ground; that the work of filling in and replacing

said trestles and piling has provided and furnished for the occupation, operation, and maintenance of said line of railroad and a continuous line of solid ground from South 15th St. to a point where navigation available for water craft and vessels generally is first reached by said line of railroad.

That the upland abutting upon the waters of said Tacoma harbor and the approaches from the land down to the water were so steep and abrupt that in order to reach, with the line of said road, the navigable waters of said harbor or of Puget sound, at said place, available for the navigation of vessels and water craft generally, it became and was necessary to construct the line of plaintiff's road in most places along said water front below the line of extreme high tide, and in many places below the line of ordinary high tide and to make the construction, operation, and maintenance of said line of railroad practicable for the reaching of deep-water navigation, said line of railroad was constructed along said harbor.

That, owing to the necessity for the speedy completion of said line of road, to make it ready for operation, it was not possible to do the work of filling in and the making of solid ground along the line of said road upon the water front at or before the time of the original construction of said road, but after said road had been in operation for some years it became necessary for the proper and convenient operation of its line along said water front that said piling and trestles by which it was supported and over which it extended should be replaced by solid, firm ground at all points along said water front where it was possible to carry on or accomplish the work of filling in ; that for the greater part of the distance over which the line of plaintiff's road extends to the northward and westward of Brown's

wharf the said line of road, as well as most of the side tracks, spurs, switches, turnouts, platforms, stations, wharves, buildings, and other improvements are built upon trestles supported by piles driven for that purpose; that for the greater part of said distance said line of road and most of said improvements and facilities are beyond, below, and outside of the line of extreme high tide, and at many points and places said line of railroad and many of the improvements and facilities are below, beyond, and outside of the line or ordinary high tide; that in many places along within said distance where the main line of said railroad and the center line of said right of way is not outside of, below, or beyond the line of ordinary high tide many of the proper and necessary facilities and improvements necessary for use in connection with the operation of said line of railroad' are situated outside of, beyond, and below the line of ordinary high tide, such as side tracks, spurs, switches, wharves, warehouses, coal bunkers, and elevators, for which there is no available space possible to be obtained between the center line of the main track of said railroad and the shore along the steep and abrupt bluff of the upland, and which, in order to be adapted to their use, must be located on the side of the main track next to the sea or waters available for navigation; that plaintiff's said line of railroad along said harbor front and the facilities and improvements built upon and along on either side thereof and in use in connection therewith are constructed in such a connected way as to form a continuous line of improvements at all points along said water front, extending outward from the land to available navigation, and so connected with improvements upon the land abutting on the shore as to become a part thereof and in the nature of an

extension therefrom and in such a way as not to be or become an obstruction or hindrance to navigation and so as not to interfere with navigation in any way whatever, but are so constructed that they can be and are used and are at all times available for use in aid of both commerce and navigation.

That all of the tracks, buildings, structures, and facilities constructed and in use in connection with the operation of said line of railroad along said water front are located and constructed within the limits of said plaintiff's right of way, even where they extend beyond and outside of the line of ordinary high tide, except small portions of the outer ends of some of the coal bunkers, wharves, and docks, which, in order to make them available for the peculiar use to which they are designed, are extended beyond the outer boundary line of the right of way, but only to such an extent as will make them available for their use and to no further distance or extent and without forming any obstruction or hindrance to navigation.

Ninth. Under and by virtue of said act of congress the said plaintiff's right of way hereinbefore described as situated along the harbor front of the city of Tacoma is the property of the plaintiff for the uses and purposes designated in said act, and is not subject, nor any part of it, to the rights or uses of any other corporation, state, municipal, or private, or of any individual, so long as the plaintiff so continues to use it for railroad purposes in accordance with said act of congress, and that so long as plaintiff so uses it for such purposes it is entitled to the exclusive possession and use thereof, and the same is not subject to be taken or to be seized by the state of Washington or any persons acting by

through, or under the authority of said state of Washington.

Tenth. That under and by virtue of an act of the legislature of the state of Washington approved March 26th, 1890, entitled "An act for the appraising and disposing of the tide and other lands belonging to the state of Washington," said plaintiff is entitled to the exclusive right for sixty days following the final appraisement of tide lands in front of the city of Tacoma to purchase the lands so improved by the construction of said wharves, warehouses, and other improvements, and the said plaintiff desires to and intends to avail itself of said exclusive right of purchase as to all lands covered by any portion of said improvements which extend beyond and outside of the limits of said right of way as well as of all the tide lands over which plaintiff has littoral or riparian rights by reason of the ownership of the uplands and right of way abutting thereon, as hereinbefore set forth.

Eleventh. That under and by virtue of the act of the legislature of the state of Washington approved March 28th, 1890, entitled "an act to create a board of harbor line commissioners," and prescribing their duties and compensation, the governor of the state appointed as such commissioners the defendants W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey; that the members of said harbor line commission have duly qualified as such and entered upon the discharge of their duties as such commissioners and are about to take final action in the location and establishment of the harbor lines within the limits of the city of Tacoma, and that, as plaintiff is informed and believes, said commission proposes and are about to locate and establish such harbor lines in such

a way as to include within such harbor lines a part or the whole of the improvements of the plaintiff hereinbefore mentioned, including a portion of the plaintiff's right of way and the wharves, tracks, stations, and other terminal facilities located thereon ; that the extension of the harbor lines over said improvements is an attempt of the board on the part of the said harbor line commission to exercise unauthorized power and to do an act which is not within the jurisdiction of said harbor line commission ; that said harbor line commission has not authority or jurisdiction under the laws of the state of Washington, as plaintiff is informed and believes, to embrace or include within the harbor lines to be located and established in front of the city of Tacoma the wharves, coal bunkers, docks, warehouses, and other improvements made thereon ; that if the harbor line commission aforesaid is not prevented by a writ of injunction from this honorable court from extending the so-called harbor lines over the wharves, warehouses, and other improvements of the said plaintiff the said commission will so extend said lines and thus deprive the said plaintiff of the use and benefit of its said wharves, warehouses, tracks, stations, and other terminal facilities, including a portion of the plaintiff's right of way, without any compensation therefor and without due process of law or process of law whatsoever, and will thus cloud plaintiff's title to the same in such a manner as greatly to embarrass and hinder plaintiff in the legitimate use of its said property.

Twelfth. That the possession which the plaintiff now has of the tide lands in front of the lands hereinbefore described is a valuable right to it, and the preference right which the said plaintiff

has under the laws of the state of Washington for the purchase of the tide lands, upon which are situate valuable improvements, as hereinbefore stated, (is a vested right) and of great value to the plaintiff.

Thirteenth. That the defendants above named, the members of the harbor line commission, in threatening to locate the said harbor lines over the said property and improvements of the plaintiff, are acting entirely without warrant of law and are acting and threatening to act entirely beyond the scope of their authority and are transcending and threatening to transcend the authority conferred upon them as said harbor line commissioners by the said act of the legislature of the state of Washington.

That the said defendant commissioners, in so acting and so threatening to act, are assuming powers over the property and improvements of the plaintiff which are not vested in defendants by law, and are infringing and threatening to infringe upon the vested rights of the plaintiff without warrant or authority of law.

Fourteenth. That the above-named defendants, the members of the harbor line commission, are threatening to and are about to locate and establish along in front of plaintiff's right of way where the same extends between 15th street and what is known as Brown's wharf, in the city of Tacoma, a water-way; that the said defendants, the members of said harbor line commission, in the location and establishing of said water-way, claim to be acting in the exercise of authority which they claim to have been conferred upon them by an act of the legislature of the state of Washington, approved March 28, 1890, entitled "An act to establish and define public ways for water crafts across the tide flats within,

in front of, and for a mile either way from all incorporated cities and towns in the state of Washington."

That section 2 of said act provides as follows:

"SEC. 2. The public ways provided for in section one of this act shall not be less than fifty nor more than one thousand feet wide and shall commence at the outer or deep-water end, in not less than twenty feet of water at low tide, and shall extend inland across the state's tide lands."

That there is not at low tide as much as twenty feet in depth in front of or beyond plaintiff's right of way from 15th street to said Brown's wharf, and, as plaintiff is informed and believes, it is the purpose and determination of said defendants, the members of said harbor line commission, to establish and locate the commencement or outer or deep-water end of said water-way at some point between said Brown's wharf and said 15th street, but at what place between said points the said outer end is to be established plaintiff has not any accurate or definite knowledge or information (except that it may be inferred from the lines designated on the maps prepared by the commissioners that the said water-way will commence at or about a point opposite the south and east line of said Brown's wharf); that for several years continuously prior hereto the work of filling in with earth, gravel, rock, brush and other material of that portion of plaintiff's right of way between 15th street and Brown's wharf which extended over land where the tide ebbed and flowed has been going on, and said work was completed prior to the time when said harbor line commission first commenced operations or gave any attention to the consideration of harbor lines or water-ways within the harbor of

the city of Tacoma; that the entire width of said right of way between 15th street and said Brown's wharf has been solidly filled with earth and is now and has for a long time been solid, firm and permanent ground, over which the tides do not ebb or flow; that for the maintaining and perfecting of the ground so filled in within the limits of said right of way between the points aforesaid and for the accommodation of landing places and warehouses a space lying adjacent and in front of said right of way between said points was also filled in solidly and made firm, substantial and permanent ground; that said space extending out from and running along in front of said right of way is of varying width, but so filled in as not to be an obstruction to navigation, but constituting a facility for and is in aid of navigation; that said water-way, if so established, will seriously and injuriously interfere with the proper use of said plaintiff's right of way and the improvements thereon and extending outward therefrom, destroy the convenient and proper access to said right of way and the said improvements; that the said members of said harbor line commission in the location and establishment of said water-way as proposed are acting without authority of law and in violation of the property rights of this plaintiff; that upon the outer line of the space filled in outside of the right of way extending between 15th street and Brown's wharf, as in this paragraph set forth, plaintiff built a sea wall adapted in all respects, both as to height and depth and method of construction, for the making and operation of a deep-water channel outside of the same of a depth of between 30 and 40 feet; that at the time said filling in was done and said sea wall constructed there was no channel south or east of said Brown's wharf having any depth of water

sufficient for purposes of navigation or of sufficient width to be available for practical use, and all the lands lying to the northward of such channel as there was between 15th street and Brown's wharf and on the outside of said sea wall were mud flats or tide lands, which were entirely bare at low tide, and the waters flowing over same were not, and are not now, navigable for vessels at any stage of the tide, and never were.

Fifteenth. That the said defendants, the harbor line commissioners, have made and prepared a plat showing the location by them of said harbor lines and of said water-ways within the limits of the city of Tacoma; that said plat, if filed, will consist of several maps showing said harbor lines or areas as the same are situated along the various portions of the water front of said city.

That the map hereto attached marked "Exhibit B" is a copy or blue print of one of the maps intended by said harbor line commissioners to be made a part of said plat and is intende to show so much of said harbor lines or harbor area intended or about to be located and established by said commission as extends from the west line of the Tacoma Mill Company's plant to the east line of Brown's wharf on the west line of South Fourth street extended, and said map also shows so much of the harbor lines and harbor area, 150 feet in width as extend from the west line of South Fourth street to the west line of South Seventh street extended, said last-mentioned harbor lines and harbor area being intended and designed by said commission to be located and established upon, along, and over and covering and including within their limits the grounds filled in between the outer line of plaintiff's right of way and the sea wall constructed

by plaintiff as aforesaid, where there were not at the time of the preparation of said maps and are not now any navigable waters or any waters of any kind at any stage of the tide, but solid firm ground over the entire portion of the limits of said area and between said lines; that it is the intention and design of said harbor line commissioners to locate and establish said harbor lines and harbor area along the water front of Tacoma between said west line of the Tacoma Mill Company's property and said east line of Brown's wharf as aforesaid, as designated upon said map, and so that the said area shall extend 400 feet inward from the outside line designated upon said map; that all parts or portions of plaintiff's facilities, improvements, tracks, buildings, and structures which are situated or extend outside of and beyond the line of ordinary high tide (where said tide line is outside of the meander line and not more than 400 feet distant inward from the outer line designated on said map), are included within said harbor area or harbor lines, and the said harbor lines as intended to be located and established, and as will be located and established by said commissioners if said map is allowed to be filed will extend over said improvements, right of way, facilities, tracks, buildings and structures, and the said location made by said commissioners will include and cover many of plaintiff's most valuable improvements and a large part of the right of way on which the same are situated.

That the map hereto attached marked "Exhibit C" is a copy or blue print of one of the maps prepared by said commissioners and intended to be made a part of the plat about to be filed by said commissioners as a part of the process of locating and establishing the harbor lines and harbor areas upon the water front of the city of

Tacoma; that it is intended by said commissioners, and it is their design, to locate, and they are about to locate and establish, harbor lines and harbor areas, as designated upon said map, extending from the east line of South 7th street extended to the east line of South 12th street extended; that the lines are so drawn and located as to provide for a harbor area 150 feet in width (including within their limits all of the space filled in between the outer line of plaintiff's right of way and said sea wall) extending from South 7th street to South 12th street, and also harbor lines are designated upon said map as intended to be located and established by said commissioners extending seaward and at right angles from the lines and area above mentioned where the same ends at South 12th street, said lines extending seaward 600 feet and so drawn as to provied for a harbor area of 150 feet in width and connecting at their outer ends with harbor lines and a harbor area extending from South 12th street to South 7th street and running parallel with the harbor area located between plaintiff's right of way and sea wall, said outer harbor lines or outer harbor area being 600 feet uniformly to the seaward from said inner harbor lines or area. Said map also represents a water-way designed to be located and established by said commissioners extending as far south and east as the east line of South 23rd street, but the initial point of which is to the seaward cannot be ascertrined from any inspection of the maps or plats of said commission or from any information which plaintiff has been able to obtain, but so far as plaintiff is able to ascertain from such information as it has obtained it is plaintiff's belief that it is intended and designed by said commission to establish said water-way between South 12th street and South 23rd street,

with a probable extension of the same seaward from South 12th street to a point about opposite the east line of Brown's wharf.

That the map hereto attached marked "Exhibit D" is a copy or blue print of one of the maps intended by said commissioners to be made a part of the plat to be filed as a plat of the harbor lines of the city of Tacoma; that said map shows so much of the harbor lines and areas as extends from the east line of Brown's wharf to South 7th street, and also the lines and area running parallel therewith and 600 feet distant therefrom, and also the lines extending at right angles to said parallel lines, at the ends thereof next opposite said Brown's wharf, and extending across the front of Commencement bay and extending northward and seaward and at right angles from the lines and areas running along the shore front, said lines including within their limits an area of 600 feet in width.

That the map hereto attached, marked "Exhibit E," is a copy or blue print of one of the maps intended and designed by said commissioners to be made a part of the plat to be filed as a part of the location and establishment of the harbor lines of the harbor of Tacoma and shows the lines and harbor area extending from the west line of the Tacoma Mill Company's property westward along the water front of the city of Tacoma,

That the map hereto attached, marked "Exhibit F," is a copy or blue print of one of the maps intended by said commissioners to be made a part of the plat to be filed, as aforesaid, and there is designated upon it the extension of the lines and area described or marked out upon "Exhibit E."

That the maps hereto attached, marked, respectively, "Exhibits G, H and I," are copies or

blue prints of similar maps, showing other portions of the harbor lines and areas intended to be located and established by the filing of the plat mentioned in this bill.

That a plat containing the lines and areas designated upon said maps has been made and prepared by said defendants the harbor line commissioners, and they now threaten to file said plat in the office of the defendant, Allen Weir, said secretary of state, and in the office of said George Haskin, the said clerk of the city of Tacoma (and who, since the filing of the original bill herein, has been succeeded in the office of clerk of the city of Tacoma by——Smythe, who is now the qualified and acting clerk of said city), and said plaintiff fears, unless restrained by the order of this honorable court, that the said commissioners will so offer said plat for filing, and that said George Haskin, the said clerk of said city of Tacoma, (or the said——Smythe, as his successor), and the said defendant, Allen Weir, said secretary of state, will so file said plat.

Sixteenth. That at the time the original bill herein was filed this plaintiff did not know, and could get no definite information concerning the exact nature of the plat which the defendants the harbor line commissioners threatened and were about to file, except that the plaintiff ascertained that the plat which said commissioners were about to file had designated thereon harbor lines and harbor areas which covered and included within their limits many of the buildings, structures, and valuable improvements and a large part of the right of way of plaintiff situated along the water front of the city of Tacoma.

That previous to the commencement of this action, and at the time of the filing of the origi-

nal bill herein, the said defendants, the harbor line commissioners, and the officers and representatives of the board which they constituted, declined and refused to show plaintiff, or any one representing it, the said plat about to be filed or any of the maps constituting the same, and refused to permit or allow plaintiff or any one representing it, to make an inspection of the same or to obtain any copy thereof, and no one representing plaintiff had any opportunity to examine said plat or said maps or to know or ascertain anything about the same until after the original bill was filed herein, and the restraining order of the court had been issued and served, and plaintiff was therefore unable to allege in its original bill the precise nature of said maps or plat or to allege anything definite concerning the same.

Seventeenth. That the said threatened acts of the said harbor line commissioners and the said city clerk and the said secretary of state if carried out will work great, lasting, and irreparable damage and injury to the plaintiff, which damages and injury is not susceptible of compensation in damages; that the plaintiff has no plain, adequate, or speedy remedy at law, and has no adequate remedy in the premises except by the issuance of a writ of injunction by this honorable court; that there is danger unless the said defendants are restrained from the doing of their said threatened unlawful acts pending the determination of the plaintiff's application for an injunction great and irreparable injury will result to the plaintiff.

To the end, therefore, that said harbor line commissioners, to wit, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, and the said George Haskin,

clerk of the city of Tacoma (and his successor in office——Smythe),and said Allen Weir, secretary of state for the State of Washington, may full, true, direct, and perfect answer make according to the best of their knowledge, information, and belief to all and singular the matters and charges aforesaid, your orator hereby waiving the necessity of the answer of the defendants or of any of them being put in under oath of any of said defendants, and that as fully and particularly in every respect as if the same were here again repeated and the said defendants and each of them hereunto particularly interrogated, and that your orator may have it adjudged and decreed that a writ of injunction of this honorable court shall issue to the said harbor line commissioners, to wit, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, and to the said George Haskin, clerk of the city of Tacoma (and his successor in said office,—— Smythe), and to the said Allen Weir, secretary of state as aforesaid, and to each of them enjoining and restraining the said commissioners and each of them from extending, locating, or establishing the harbor lines in front of the city of Tacoma or in the harbor of the city of Tacoma over any of the wharves, warehouses, tracks stations, or other terminal facilities included within any portion of a strip two hundred feet in width on either side of plaintiff's main line of railroad, as the same runs along the harbor front of the city of Tacoma from Fifteenth street, in said city, northwardly and westwardly to the cove used as a log pond or log dumping ground by the Tacoma Mill Company at the western boundary line of the land described in this bill, and from extending, locating, or establishing said lines over any portion of the said width of two hundred feet on either side of said main line of

track, as the same runs along said harbor front as aforesaid; also from extending, locating, or establishing such harbor lines over any of plaintiff's wharves or its other facilities of navigation or commerce extending out from or in front of said strip or the adjacent upland in said bill described, and from locating or establishing any water-ways upon, along, or over or in front of any portion of said width of two hundred feet on either side of the centre of the main line of plaintiff's railroad where the same runs along said harbor front from Fifteenth street in a northwardly and westwardly direction to the structure known as "Brown's wharf," in said city of Tacoma.

And enjoining and restraining the said George Haskin, city clerk of said city of Tacoma (and his successor in said office——Smythe), and the said Allen Weir, secretary of state for the state of Washington, from receiving and filing any plat or map showing the location of said harbor lines in front of or within the harbor of the city of Tacoma over any of the wharves warehouses, tracks, stations, or other terminal facilities included within a width of two hundred feet on either side of the center of said plaintiff's main line of railroad along the harbor front of said city of Tacoma or extending out from or in front of said width, or any map or plat showing the said harbor lines over any portion of said width or showing the location of any water-way upon, along, over, or in front of said width of two hundred feet upon either side of the center of the main line of plaintiff's railroad where the same extends from Fifteenth street to Brown's wharf:

And that pending the hearing of the plaintiff's application for the said order directing the issuance of said injunction your orator may have

granted an order restraining the defendants, the said harbor line commissioners, and each of them, from so extending, locating, or establishing the harbor lines in front of the city of Tacoma over any of the wharves, warehouses, tracks, stations, or other terminal facilities included within any portion of a strip two hundred feet in width on either side of plaintiff's main line of railroad, as the same runs along the harbor front of the city of Tacoma from Fifteenth street, in said city, northwardly and westwardly to the cove used as a log pond or log dumping ground by the Tacoma Mill Company, at the western boundary line of the land described in this bill;

Also from extending, locating, or establishing said lines over any portion of the said width of two hundred feet on either side of said main line of tract, as the same runs along said harbor front as aforesaid;

Also from extending, locating, or establishing such harbor lines over any of plaintiff's wharves or its other facilities of navigation or commerce extending out from or in front of said strip or the adjoining upland in said bill described;

And from locating or establishing any waterways upon, along, over, or in front of any portion of said width of two hundred feet on either side of the center of the main line of plaintiff's railroad where the same runs along said harbor front from Fifteenth street in a northwardly and westwardly direction to the structure known as Brown's wharf, in said city of Tacoma;

And enjoining and restraining the said George Haskin, city clerk of said city of Tacoma (and his successors in said office,——Smythe), and the said Allen Weir, secretary of state of the state of Washington, from receiving or filing any plat or map showing the location of said harbor

lines in front of or within the harbor of the city of Tacoma over any of the wharves, warehouses, tracks, stations, or other terminal facilities included within a width of two hundred feet on either side of the center of said plaintiff's main line of railroad along the harbor front of said city of Tacoma, or extending out from or in front of said width, or any map showing the said harbor lines over any portion of said width or showing the location of any water-way upon, along, over, or in front of said width of two hundred feet upon either side of the center of the main line of plaintiff's railroad where the same extends from Fifteenth street to Brown's wharf;

And that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet—

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, directed to the said W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, constituting the harbor line commissioners of the state of Washington, and George Haskins, city clerk of the city of Tacoma, (and his successors in said office ——Smythe), and Allen Weir, secretary of state for the state of Washington, commanding them and each of them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience, &c., &c.

MITCHELL, ASHTON & CHAPMAN
AND ANDREW F. BURLEIGH,
Solicitors and Counsel for Plaintiff.

Appellants express surprise that the railroad company should complain at the commissioners making out and filing the plat locating the harbor line in front of the city of Tacoma as set forth, and are not able to see wherein this clouds the title of the road or damnifies it in any way. It is true this mere map-making and map-filing in itself is innocent, inoffensive and harmless, but this leads to graver deeds, under the provisions of the law creating this board of commissioners and giving it power and authority, as the complaint shows and as is admitted by appellants' demurrer. It is the initiatory, but under the law the absolutely necessary initiatory step to the doing of other things, which, when done, will violate the rights of the road and work incalculable and irreparable mischief to it.

The road then undertakes to stop this proceeding at the threshold, to prevent the first step threatened so that other steps leading to consummation can not be taken. Indeed, waiting till this and these other steps are taken, the road is estopped ; it is cut off by acquiescence. The road asked merely not to still the rattle but to draw the fangs, ere material and remediless damage is done. This is the very sum, the very beauty of the intervention by an injunction. It is the realization in full of that truism of an ounce of preventive being better than a pound

of cure. And it is perfectly certain that it was the duty of the road to ask for this, if it intended to ask at all, upon the very first move—the very first threat that was made to enforce this law.

But the map-making is not all, for the complaint, from paragraph eleven to seventeen inclusive, plainly and specifically states the overt acts these commissioners are threatening to do, the active steps they are about to take, to the great damage and prejudice of appellee, and besides, the latter part of paragraph sixteen of the complaint avers most positively, these commissioners will not let appellee, or any one representing appellee, look upon and inspect these maps, but absolutely refuse them this poor privilege. They keep these maps to themselves under cover, as a masked battery, to open upon and destroy appellee when least suspecting.

These matters in the paragraphs referred to, so distinctly averred, are admitted to be true by the demurrer. A clearer case and a more urgent case for the interposition of an injunction probably could not be made out.

Adams Eq., 207–9, 218 et seq (7 Am, Ed).
Willard's Eq, 341 et seq, 381 et seq (Ed. 1855).
1 Fonbl. Eq., 3, 50.
1 Eden Inj., (Waterman's 3 Ed) 9–14.
Kerr Inj, 16–22; 121 (3 Ed).

Several grave errors lurk in the position of

appellants asserted here and in other similar cases, that the prohibition against this work under this commission must be made for and in behalf of others than mere private corporations, or if you please, private persons. Conceding that these are matters of public concern, and a check to them might be made, if they are wrong, by public complaint, no less can private persons, corporations, etc. be heard to complain when their injury is something distinct and apart from that of the public. The priv
legitimate and is not viewed in t
public to complain when the inj
different from and other than that of the public, no more than a man who breaks his leg on account of the bad condition of roads is deprived of his right to sue and recover against the overseers of roads, because the parties responsible may be proceeded against by public prosecution for having the roads in such condition.

Kerr Sup., 120–2, 147.
Adams Sup., 210–212.
Lansing v. Wiswall, 5 Denio 213.
Endl. Inter. Stat. Sec. 473 & notes.

It is shown in plain and emphatic terms in the complaint, that the contemplated work of this commission being completed, appellee suffers beyond pecuniary recompense in the taking away

and destroying large property placed there and owned by it, and to which the public has no right, and in which the public has no interest, which fact will be further referred to and explained hereafter.

Another error, manifest in this connection is to speak of this road being a private affair strictly speaking. In view of the history of its creation as a company, and the building of the road, this company has large and important interests of the United States in its hands, and under its management. The necessity of a connection with that far off country west and its development and bringing it in more direct communication with the eastern portion of the Union, the transportation of the mails and of military officers, supplies, etc., ofthe United States, make it a great national agency, and so declared by law to be ; and its injury or destruction must be hurtful to the United States in a manner not to be mistaken. It must be apparent then, the placing this company as, or on the footing of a private concern is an abuse of language which is calculated to mislead in the last degree. This error conduces to another, in applying certain established rules of law in this or other cases similar, wherein this company and others like it are parties in suit. That is, when we are told that the general rule requiring grants from or by

the sovereign to be construed most favorably for the grantor and most strongly against the grantee, applies as to the grant to this company, we are told what, it is most respectfully submitted, cannot be true in the nature of things, and what this court and other high authorities has said is not true.

Some comment has been made as to the relations sustained by the United States to this company, and they are sufficient it is thought, to set aside this construction as to this grant. But this court in the case of the *Union Pacific Railroad Company*, 91 *U. S.*, 72 *et seq.*, under a grant of close kin to this showed beyond question, these grants were made for great national purposes, to be reached and attained and not thwarted and defeated, and that to this end these grants, as with or against the government or any party, are to have a liberal construction. ***

And there has been in all the cases upon any of these grants before this court, since then no deviation—not the slightest—from this view. But quite the contrary is the case here and in other courts, and in the executive departments of the government where these matters have been discussed. It is useless to burden this brief, or to trouble this court, with citations further on this point, for the court is familiar with them. Only recently, however (9 Decs. Pub., L. 487),

*** From the earliest period it has been settled, that statutes tending to effect an object of great public utility ought to have the most liberal interpretation.
7 Johns Ch. 342: 11 Co. 73 b: Str. 253: 2 Vern. 431:

the Secretary of the Interior, with the question directly before him as to the limit, purpose, and effect of a kindred grant said :—"but on the contrary, having made the grant, it was intended it should be enjoyed, and no technical rules of law or adroit schemes of adjustment should be permitted to calculate the beneficiaries of congress out of this bounty intended for them."

A construction then which secures the building and operating of this road as intended by its charter, and as set forth in the complaint being the proper one, it is shown by the complaint that this road could not be built from the lake to the sound without crossing the Snake river, the Columbia river and other navigable and meandered rivers.

And it shows further, that no violence has been done by appropriating an excessive amount of premises about the terminal point—none whatever, and these points being confessed by the demurrer, this would seem, in any view we may take of the question presented, to end the controversy.

Aside however from reaching a conclusion by the mere construction of the charter standing alone, we insist upon two propositions which we regard as supported and established by authority not to be questioned.

First.—The power of Congress to authorize an interstate railroad to build to, or below, high-water mark, cannot be questioned.

It is unnecessary to consider the question whether Congress would have the power to make a grant of any part of the shore of navigable waters in a territory of such a character as to interfere with the use by the public of such navigable waters. It is sufficient to maintain that Congress can make a grant of the shore for the promotion of commerce. It is impossible to offer any argument to show why Congress should not have precisely the same control over such lands in the Territories as is usually exercised by the States, and certainly it must have as great control over the navigable waters of Territories as it has of States, after they have been admitted to the Union. The power of a State to control the rights of the riparian owner, and to facilitate navigation by authorizing the construction of wharves and piers, is too well recognized to need authorities in its illustration. The state of Washington itself has undertaken to improve the navigation of the waters of Puget Sound. But it has always been recognized that the right of a state to legislate upon such subjects is subordinate to the right of Congress, in case Con-

gress should elect to adopt its own regulations. See thirty-fifth section of *Gould on Waters*, and the cases cited in the notes, particularly the case of *Savannah v. The State, 4 Ga., 26;* see, also, *Gilman v. Philadelphia, 3 Wallace,* 713; and *Bridge Company v. United States, 105 U. S., 470.* In the fourth and fifth chapters of Gould, the authorities in reference to the construction of wharves, docks and piers, are fully collected. Congress has wisely abstained from interfering with the local regulations of the different states, and different rules prevail in different States as to the title of the riparian owner below high-water mark. But it has never been doubted that the State could make such regulations, in respect to wharves, piers and docks, as were deemed advisable for the improvement of navigation, though such regulations authorized the filling up of tide flats and the extension of piers beyond the low-water mark. The right of Congress to promote and develop the commercial interests of the Territories, while under its control, must be equally great, and what the State of Washington can now do the Congress of the United States could have done while it was the sovereign proprietor of the Territory. The claims of the owners of Valentine scrip were successfully resisted upon the ground that in giving a right to locate upon the public lands of the United States,

Congress had not intended to authorize a location upon lands lying below high-water mark, and it was even contended that Congress did not have the power to make a grant of the shores of navigable waters to a private individual without regard to the rights of the public; but it was sufficient, in order to insure the rejection of the claim, to argue and hold that the grant of Congress did not apply to anything below high water. It is, however, entirely superfluous to debate the question of the power of Congress in a Territory, in view of the decision of the Supreme Court of the United States in the telegraph case (*Pensacola Telegraph Company v. The Western Union Telegraph Co.*, 96 *U. S.*, 1), and the opinion of Mr. *Justice Bradley* in the Arthur Kill case, 32, F. R., 9. If Congress possesses the power to authorize the construction of a line of telegraph through a State, or of a railroad across an arm of the sea lying within the boundaries of a State, against its protest and opposition, it certainly could authorize a transcontinental railroad, running from the Great Lakes to the Pacific, to reach navigable waters at either end.

Second.—The charter of the Northern Pacific Railroad Company, and its supplements, fully authorize the building of the railroad to its present terminus.

The title of the act is "An act to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast," The second section authorizes it to pass through "the public domain;" the third section declares that "the purpose of the land grant is to aid the construction of such railroad and telegraph line to the Pacific Coast;" and the seventh section authorizes it to hold "any lands or *premises* that may be necessary for *the working* of said road, and for station-houses and any other *structures* that may be necessary in the working of the road;" and by the act of March 1st, 1869, the term "Puget Sound" was construed to mean "all the waters connected with the straits of Juan de Fuca." In construing such language it is necessary to consider the object which Congress had in view, and the general purpose and scope of the enterprise. Congress not merely granted the franchise to build a transcontinental road, but it contributed out of the national domain millions of acres to aid in its construction, and it would be absurd to suppose that Congress would have given such powers and be-

stowed such subsidies for the purpose of building a railroad between the waters of the Great Lakes and the Pacific Coast without intending that, when finished, it should reach deep water at both ends. If that had not been its purpose it would have been intending to defeat the very object of its own grants. This was so understood by the Legislature of Minnesota, as, when it came to give its consent, by the act of March 2d, 1865, to the construction of the road within the limits of that State, in view of the fact that the act of Congress provided that the road might begin at a point on Lake Superior in the State of Minnesota or Wisconsin; the legislature made its grant subject to the following proviso:—

"*Provided*, That should said company elect to make the eastern terminus of said road east of the eastern boundary of the State of Minnesota then and in that case they shall construct or cause to be constructed a line of railroad from the said main line *to the navigable waters* of Lake Superior within the State of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights, and privileges are hereby granted to said company as they have or may have to construct said line within the State of Minnesota."

In point of fact, when the road came to be built it was extended to the navigable waters of Lake Superior at Duluth, and wharves and piers, with elevators and all other adjuncts for the transac-

tion of business were erected at that terminus, as wharves and piers and elevators and coal-bunkers were constructed at Tacoma.

It is submitted that the true intent of Congress is to be found fully, adequately, and broadly set forth in the title of the act, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to the Pacific Coast." These are words having a large scope and broad significance, and considering the nature of the work and its vast extent and importance it seems more natural to ascribe to this general grant a construction which would make it effective, and treat it as carrying with it all incidental powers essential to its manifest purpose than to belittle it by a mere verbal discussion.

If requisite, however, it is easy to show that from the words themselves, without the aid of any outside considerations, the Northern Pacific Railroad Company had the clear right to fix its terminus where it did, and reach it by the route which it adopted. The very case, in which Chief Justice Black delivered the opinion which is so frequently quoted, was one in which the authority to build to the city of Erie was held to be an authority to commence or terminate at any point in the city of Erie. *Commonwealth vs. Erie & Northwestern R. R. Co., 27 Penna. (3 Casey), 239, 334.* This has now become the

settled rule of interpretation, and it is perfectly well settled that where a railroad is empowered by its charter to construct a railroad *at*, *to*, or *from* a certain place it may select any point within that place which it chooses, and to build upon and occupy the streets of a city in going to or from it. *Mohawk Bridge Company vs. Utica and Schenectady R. R. Co., 6 Paige Chan. Rep., 554; Farmers Turnpike Company vs. Coventry, 10 John., 389.*

"A railroad company having the power to construct a railroad between two designated places can construct the same over the lands of the state lying in the contemplated route of the road." *Ind. Cent. R. R. Co. v. State of Indiana, et al., 3 Ind. 421; Union Pacific R. R. Co. v. Douglass, 31 Fed. Rep. 540;* or it may cross navigable rivers in passing between its termini under the implied authority; *Bridge Company v. Hoboken Land & Imp. Co., 2 Beas. N. J. Chan., 81; Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige, 554;* or it may occupy a public street or highway under like implication; and "an act of assembly authorizing a company to construct a railroad to connect with any railroad constructed, or to be constructed, at any point on the northern boundary of Erie or Warren County," granted power to terminate the road at any point in the boundary named which the com-

pany might select, and did not limit the terminus to another railroad. *Commonwealth v. Cross Cut R. R. Co., 53 Pa. St., 62, 68.*

"An authority to build to the state line anywhere within two counties is a wide and indefinite authority, but it carries with it necessarily the corporate power to exercise a sound discretion in fixing definitely the place on the state line within these counties to which to build, and when in the exercise of a sound discretion the company fixes the place the authority instantly attaches, and it becomes an authority to build to that place; it becomes the legally designated terminus." *Id.*

"It is true the original company was chartered to construct a road 'from the city of Allegheny,' &c., but that clearly means from any point within the city. Moreover, companies chartered either under the act of 1849, or the act of 1868, are expressly authorized to extend their respective roads into any city, town, or village named in their charter as a terminal point, provided that in the case of an incorporated city the streets, lanes, and alleys thereof shall not be occupied by any such railroad without the consent of the corporate authorities first had and obtained. In this case such authority was expressly given by ordinance."

Western Penna R. R. Co.'s Appeal, 4 *Am. & Eng. R. R. Cases*, 191–197.

The editor adds the following note: —

"Where the charter of a railroad company empowers it to construct a line of road 'beginning or ending at' a place, or 'beginning from,' or 'running to' it, these terms are construed as

inclusive and authorize a location within the place. *Hazlehurst v. Freeman*, 52 *Ga.*, 244; *Tenn. & A. R. R. Co. v. Adams*, 3 *Head*, 596; *Rio Grande R. Co. v. Brownsville*, 45 *Tex.*, 88; *Comm. v. Erie & N. E. R. R. Co.*, 27 *Pa. St.*, 339; *Moses v. Pitts., Ft. W. & Chicago R. R. Co.*, 21 *Ill.*, 516; *Farmers' Turnpike Road v. Coventry*, 10 *Johns.*, 389; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 *Paige*, 554; *Union Pac. R. R. Co. v. Hall*, 91 *U. S.* 343; *Long Branch Com'rs v. West End Ry. Co.*, 2 *Stew.* (*N. S.*), 566; *National Docks Co. v. Central R. R. Co.*, 5 *Stew*, (*N. S.*), 785.

"So of the terms 'at,' or 'near,' or 'at or near,' and the like. *Attorney Gen'l. v. West Wisc. R. R. Co.*, 36 *Wisc.*, 466; *De Long v. Schemmel*, 58 *Ind.*, 64; *Fall River Iron Works v. Old Colony & F. R. R. Co.*, 5 *Allen*, 221; *State v. Hudson Tunnel R. R. Co.*, 9 *Vroom*, 548; *Central R. Co. v. Penna. R. Co.*, 5 *Stew.* (*N. S.*), 756.

"So where the authority is to construct the lines 'between' two places. *Morris & E. R. Co. v. Central R. Co.*, 2 *Vroom*, 205. And a very large discretion is allowed to the railway company in determining where its terminus shall be fixed, which will not be controlled by the courts unless for very clear excess of power, or unless bad faith be shown."

West Penna. R. R. Co.'s Appeal, 4 *Am. & Eng. R. R. Cases*, 200, *notes.*

"A grant of power in a railroad charter 'to locate, construct, and maintain and operate with horse or locomotive cars, from the city of Chicago to any point in the town of Evanston, a railroad,' &c., without any express or implied restrictions, will authorize the grantee, so far as the state is concerned, to locate its tracks and

fix its Chicago terminus at any point in the city, as 'Chicago,' simply includes every part of Chicago."

Chicago & N. W. R. R. Co. v. Chicago, & Evanston R. R. Co. (112 *Ill.*, 589), 25 *Am. & Eng. R. R. Cases*, 158.

"Where the charter of a railway company gives it the right to build 'from' a certain city, the mere fact that it originally made its terminus at the outskirts of such city does not, unless it affirmatively appears that it had elected to fix its terminus at that point, preclude it from building its road to the Union depot within such city."

"The case of *McCartney v. Chicago & E. R. R. Co., 112 Ill., 611, 29 Am. & Eng. R. R. Cas., 326*, is exactly in point with the principal case. It is there held that the words 'to' and 'from' a place or city, as contained in a charter authorizing the construction of a railroad, should be construed to mean to or from a point within the place to or from which the road is authorized to be constructed. Accordingly, authority to construct and operate a railroad from the city of Chicago to any point in the town of Evanston was held to authorize the location and operation of the road from any point within the city of Chicago. It was also held in this case that where a railroad company is authorized to build a railroad from a city to another place, the fact that it is also empowered to contract with a horse-railroad company for the joint or separate operation of either or both companies' roads, as may be agreed upon, will not operate as a limitation upon the railway company in respect to its entrance into the city." And see to same effect *Chicago & N. W. R. R. Co. v. Chicago & E.*

R. R. Co., 112 *Ill.*, 589, 25 *Am. & Eng. R. R. Cas.*, 158.

"*Western Pennsylvania R. Co's. Appeal*, 99 *Pa. St.*, 155, 4 *Am. & Eng. R. Cas.*, 191, is also pertinent. In that case it appeared that a railroad company authorized by its charter to construct a railroad from an incorporated city to another point, accepted an ordinance passed by the councils of such city granting it a right of way up to a certain point therein. It then built its track up to that point and established its freight and passenger depots. There was no other act upon its part indicating an intention to fix its terminus at that point. The Supreme Court of Pennsylvania held that the power reposed in the company to locate and establish a terminus had not been exhausted, and that it might, with the consent of the city councils, subsequently extend its line to a point beyond that where its depots were situated. And see note to this case, 4 Am. & Eng. R. Cas., 200. And see generally as to the location of the terminus of a railroad, *Chicago, &c., R. Co. v. Dunbar* (*Ill.*), 5 *Am. & Eng. R. Cas.*, 253; *Simms v. Brooklyn St. R. Co.* (*Ohio*), 4 *Id.*, 132; *South Chicago R. Co. v. Dix* (*Ill.*), 17 *Id.*, 157; *Murphy v. Kingston, &c., R. Co.* (*Ont.*), 25 *Id.*, 178; *Piedmont, &c., R. Co. v. Speelman* (*Md.*), 30 *Id.*, 316;" *Id., note.*

It is clear, therefore, that under its authority to build to a point at or near Portland the company had a right to select any point it saw fit in the city of Portland, and in like manner, under the authority to build to some point on Puget Sound, it could select any point upon the sound,

and reach it in any way which, in the reasonable exercise of its discretion, it saw fit to select.

The precise question, however, of the right of a railroad corporation to acquire lands under water with or without a water front for piers and wharves to facilitate the transportation of freight, has been adjudicated by the New York Court of Appeals in the matter of *N. Y. C. & H. R. R. Co.*, 77 *N. Y. Rep.*, 248. The remarks of the judge delivering the opinion of the court are so apposite that no apology is needed for quoting them at length :

"The objection that land under water cannot be taken by reason of any provisions of law relating to the taking of land, or that the acquisition of land under water, with or without water front, stands upon different principles from that of ordinary land, is not, we think, available in this application. The effect of such a rule would be to prevent the appropriation of land, in many instances, which might be absolutely indispensable for the business interest and success of a railroad corporation. Such a rule would lead to great embarrassment in the prosecution of railroad enterprises, and would not be a practical application of the law relating to the acquisition of land in such cases. Experience in the management of railroads demonstrates clearly that piers, wharves, and docks, whereon tracks may be laid and at which vessels may lie to receive freight, are quite as essential as other facilities, and observation shows that, in many cases, without the auxiliaries, railroad corporations would be inefficient and fail to answer the great ends

for which they were organized. To hold that they must be summarily arrested when they approach a water front, where piers and wharves are required for vessels in which to discharge the produce and merchandise transported, would be circumscribing the operation of such corporations and confine them within a limited field of action which might seriously impair their usefulness and greatly interfere with the objects which they were intended to accomplish. When, therefore, it appears that land is required in connection with the transfer and delivery of freight by a railroad company for piers and wharves, which increases the facilities for transportation and benefits the public at large, no sound reason exists why it should not be used for such a purpose, Such an object is not an interference with the rights of the public to the free and unobstructed use of the piers and wharves for the purposes of trade and commerce, but is in futherance of these very objects." * * *

"It may be fully conceded, we think, that under the acts of the legislature granting the land under water to the city of New York, it is held in trust for the uses therein mentioned, and that it cannot be appropriated for any purposes inconsistent with such use and the rights of the public in the waters. And yet it by no means follows that such rights are invaded by an appropriation for the purposes now claimed. In fact it is entirely consistent with the objects of the grant that great railroad enterprises should be permitted to enjoy the privileges which were intended to be conferred for the public benefit. Without close communication of the railroads, in the city of New York, and in other large cities which are located near the water, with the water front, the means of transporting produce and

merchandise would be seriously interrupted, and great and irreparable injury would result to the business interests of such localities, as well as the public at large. This clearly could not have been intended, and the use of the piers and wharves for tracks and other purposes, in conducting the legitimate business of these corporations, is an absolute necessity in many cases."

* * * * * * *

"Nor is there any just ground of complaint that the company receive freight at its depot, and make arrangements for freight conections with lines of steamers and vessels, the same as it does with other railroads. What lawful objection can there be to thus extending its business and increasing it facilities? Why should it not aid in carrying the produce of the country to other lands, where larger prices and larger rewards for the labor of the producer can be obtained? Such enterprise is within the scope of its legitimate business, and if lawfully pursued should be encouraged."

* * * * * * *

"A careful examination of the various objections urged by the appellants leads to the conclusion that the objects for which the petitioners seek to acquire the land in question are entirely proper and lawful and within the scope of the grant of power which authorizes the taking of land for railroad purposes. The only limit to the power in such cases is the reasonable necessity of the corporation in the discharge of its duty to the public. This necessity includes the acquisition of land and accommodations for all depots and buildings, convenient and proper for the storing and keeping of its cars and locomotives when not used; for the receipt, delivery,

storing, and safe-keeping of freight and property, as well as such facilities as are usually required in operating the road; the successful prosecution of its business; the general purposes of the corporation, and the design in contemplation by the legislative grant. (*In re N. Y. C. & H. R. R. Co. vs. Kip*, 46 *N. Y.*, 546. *In re B. & A. R. R.* Co., 53 *Id.*, 574; *In re N. Y. C. & H. R. R. Co. v. M. G. Co.*, 63 *Id.*, 331.) Where the necessity exists, and a reasonable discretion is exercised, the courts will not interfere. Within this rule we think it is established that the objects in view are legitimate and proper, and that the application of the petitioners in this respect is well founded."

See also In re N. Y. & West Shore R. R. Co., 89 *N. Y.*, 454.
Kerr v. N. Y. & West Shore R. R. Co., 127 *N. Y.*, 269.
Hanford v. St. Paul & Duluth R. R. Co., 44 *Am. & E. R. R. cases*, 205.

In this last case it is assumed as a matter of course that riparian rights are subject to condemnation, but a still more instructive case upon the facts is that of the matter of *Staten Island Rapid Transit Co.*, 103 *N. Y.*, 273, for there the corporation which claimed the right to exercise the right of eminent domain was a local railroad company, organized to build a road along Staten Island to a point opposite the city of New York, for the purpose of there constructing extensive terminals necessary to accommodate the Baltimore and Ohio system, and one of the

questions was as to the right to provide terminals in advance of the immediately present wants of the company and for a foreign corporation, but the Court of Appeals of New York held that the right clearly existed. It may be observed that the projected terminals of the Baltimore and Ohio system at this point are much greater in extent than those of the Northern Pacific Railroad Company at Tacoma. In delivering the opinion of the court, Ruger, C. J., said :

"The proof shows that the petitioner is a domestic railroad corporation operating a line of road on Staten Island, which has been mainly used heretofore for local purposes, but which it is now proposed to utilize as a connecting link between the system of railroads known as that of the Baltimore and Ohio and the port and city of New York. The vast increase of business which such a connection will occasion to the petitioner's railroad, and the necessity of increased facilities for handling it, is too obvious to be disputed. The benefit to be derived from such a connection, not only to the public but also to the petitioner, is clearly apparent from the evidence, and renders the object for which the appropriation of the land in question is sought a public use within the meaning ascribed to that term by the decisions of this court." (*In re N. Y. & H. R. R. R. Co. v. Kipp*, 46 *N. Y.*, 547; *in re N. Y. C. & H. R. R. R. Co.*, 77 *Id.*, 263.)

"The fact that the condemnation of the land in question is also earnestly desired by a foreign railroad corporation, and will inure largely to its

benefit, furnishes no reason for denying the relief asked for by the petitioner, provided it has brought itself within the language of the statute authorizing such a proceeding." (*In re N. Y. L. & W. R. R. Co.*, 99 *N. Y.*, 21.)

In view of these decisions, as well as of the object of the railroad, which was to connect the waters of the Great Lakes with the Pacific Ocean, it cannot be doubted that the Northern Pacific Railroad Company could fix its terminus where it did and reach it as it did, and having made its location, and its action having been approved, and large expenditures having been made upon the faith of it, it is impossible for the State of Washington to successfully impeach its title. Without a proper terminus at tidewater the construction of the railroad would have been useless and its successful operation impossible; and it being apparent that what was done was done in good faith under official sanction, and was followed by enormous expenditures and resulted in the creation of the city of Tacoma and the development of the Territory of Washington, it cannot be possible that, under a plea of protecting the rights of the public in the navigable waters of the harbor of Tacoma, it can be possible for the defendants to confiscate the works constructed in the interests of the public for the purpose of improving such navigation

and developing the commerce of Puget Sound and the Pacific Coast.

As to the question arising upon riparian rights, wharfing-out, tide-waters, tide-lands and all that, we wish to refer the court in addition to what may be said here, to the briefs and arguments for plaintiffs in error in 912, *Yesler case*, recently dismissed on a jurisdictional question not involved here, and 1132, *Shively case*, submitted at this term, and now *Cur. Adv. Vult.*, and one of appelleee's counsel here represented, in part, the plaintiffs in error in those cases. There is nothing to be added to these arguments that we can see. In the main brief for plaintiff in error in 912, a case of importance is referred to, p. 27, from Connecticut (*Simons v. French*, 25 *Conn.*, 346). Upon further examination, we find this case has been affirmed by the same court, in quite a recent case, apparently covering the whole ground, *Farist Steel Co. v. City of Bridgeport*, 60 *Conn.*, 278, and we ask the court to carefully consider the same.

Nor do we find anything, in the recent thorough exposition of the law on these points by Mr. Justice Field, in the Chicago Lake Front case, militating against these views; but on the contrary, as applied to the facts in each case, our claim is sustained by that decision, which protects the riparian rights of the road against the

encroachments attempted by the harbor line commissioners.

The grant being made to go through the territory of Washington, and the road being built through there and completed while it was yet *territory* and not *state*, from what source does the state get authority to unravel and undo all this, and set aside this work? If anything is received and adopted as sound doctrine in this country, it is that rights and liabilities accruing in and under territorial rule or dominion are not interfered with when the territory becomes a state—political changes and revolutions affect them not—debts and everything follow. The state as well can set aside a man's patent to lands issued before she becomes a state, she can repudiate and outlaw everything done and executed while in a territorial condition, divorce people who married before her admission and bastardize their children born before her admission as well. But we have the ruling of this court so express on this we quote: "Nor does the ownership pass from the United States and rest in a particular state when the latter becomes organized, as a separate commonwealth, throws off its territorial character and is admitted as a state into the Union; but the nation retains its property and from it must all private purchasers derive their rights."

Irvine v. Marshall, 20 *How.*, 558.
And see 3 *Washb. R. Prop.*, 171, *note* 3.

It makes no difference what changes may occur, it is, as Emerigon, quoting from Dumoulin, says: "It is always the same people, the same senate, the same legion, the same edifice, the same flock, the same ship." (*Emer. Ins.*, 145.)

Here then is a valuable property right acquired and vested in this company before Washington became a state, which she was bound to recognize and respect when she so became.

Then how can Washington state take this property without compensation and without due process of law—in other words, confiscate it? This question is discussed quite freely in the main brief for plaintiff in error in *Yesler's case*, 912, *Sup.*, and we beg to refer to that. But we will examine this question more minutely under the constitution and laws of Washington herself, in connection with some authorities.

In the treaty of cession between the United States and France, concluded April 30, 1803, it will be seen that Article 3 provides that the inhabitants of the ceded territory shall be incorporated in the union of the United States and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the meantime, they shall be maintained and protected in the free enjoyment of their

liberty and property and the religion which they profess.

In the organic act, or the U. S. Revised Statutes applicable to Washington Territory, section 1891, it is provided that the constitution and laws of the United States which are not inapplicable shall have the same force and effect within all the organized territories and in every territory thereafter organized as elsewhere in the United States.

In the enabling act is the provision, that the constitution of Washington shall be republican in form and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence.

Article I. of the constitution of Washington, section 2, provides that the constitution of the United States is the supreme law of the land.

"Section 3. No person shall be deprived of life, liberty or property without the *due process of law.*

Section 16. No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner * * * * *

Section 23. No * * * * law impairing the obligations of contracts shall ever be passed."

Article 15 of the constitution of the State of Washington relates to harbors and tidewaters.

See also section 2 of article 27, providing that the state constitution shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company or any municipality or private corporation.

The leading case construing the XIV amendment to the U. S. Constitution, and holding that a state has no power to deprive a citizen of his property without compensation being made, is *Scott v. City of Toledo, 36 Fed. Rep., 385–392,* decided Sept. 28, 1888. On this subject the court uses the following language: "Whatever may have been the power of the state on this subject prior to the adoption of the XIV amendment of the constitution, it seems clear that since that amendment went into effect such limitations and restrictions have been placed upon their power in dealing with individual rights, that the states cannot now lawfully appropriate private property to the public benefit or to public uses without compensation to the owner." This case is approved and followed in *Murdock v. City of Cincinnati, 39 Fed. Rep., 89.*

In *Davidson v. New Orleans, 96 U. S.,* 97, 107, Mr. Justice Bradley, in a concurring opinion, says:

"In the conclusion and general tenor of the opinion just read, I concur, but I think it narrows the scope of inquiry as to what is due

process of law more than it should do. It seems to me that private property may be taken by a state without due process of law in other ways than by mere direct enactment or the want of a judicial proceeding. If the state by its law should authorize private property to be taken for public use without compensation * * * I think it would be depriving a man of his property without due process of law. * * * I think, therefore, we are entitled under the XIV amendment not only to see that there is some process of law but due process of law provided by the state when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking—whether under the taxing power, power of eminent domain or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in this special case, it will be adjudged 'due process of law,' but if found to be arbitrary and unjust it may be declared to be not 'due process of law.'"

The question of the power of a State to appropriate private property, meaning of the term "due process of law," and its equivalent "law of the land," are fully discussed in the case of *Taylor v. Porter*, 4 *Hill, N. Y.*, 140. In that case it was held that words "due process of law," are equivalent to "by the law of the land."

The meaning of the provision is, that no person shall be deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the

course of the common law. It must be ascertained judicially that he has forfeited his privileges or that some one else has a superior title to the property he possesses, before either of them can be taken from him; it cannot be done by mere legislation.

Chief Judge Bronson says: "I shall not be understood as saying that a trial and judgment are necessary in exercising the right of eminent domain. When private property is taken for the public use, the only restriction is that just compensation shall be made to the owner."

In *Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 *Wend.*, 59, Mr. Senator Tracy said: "The words 'due process of law,' should be construed as equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken only for a public use, and then only upon a just compensation."

In *Davidson v. New Orleans*, 96 *U. S.*, 97, the Supreme Court of the United States holds that "due process of law" is equivalent to the "law of the land" in Magna Charta. The provision of the XIV amendment is a restriction on the legislatures of the states, and a state cannot make anything "due process of law" by declaring it to be such by legislation.

"Due process of law" and the "law of the land" are equivalent expressions.

Millet v. People, 117 *Ills.*, 294.
Dent v. W. Virginia, 129 *U. S.*, 114.

In *Jones v. Robbins*, 8 *Gray*, 329, Chief Justice Shaw says, that the term "law of the land" does not mean the law of the land at the time of the trial, because the laws may be shaped and altered by legislation from time to time, but it means the ancient established law and course of legal proceedings by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights.

The terms "due process of law" and "the law of the land" are held to mean a judicial proceeding, regularly conducted, in a court of justice, as contradistinguished from statutory enactment. Any other construction would deprive the guaranty of all its force, and put the rights it was designed to protect at the mercy of the legislature.

Gorman v. State, 34 *Ala.*, 216.
Seco v. Wenthrop, 37 *Me.*, 171.

A person cannot be deprived of his property by constitutional amendment.

Clark v. Mitchell, 69 *Mo.*, 627.

In the case of *Lindsay v. Commissioners*, 2 *Bay*, 38 (S. C.), in 1796, the court were equally divided on the question whether lands might be taken for use of public highways without any

compensation to the owner consistent with the fundamental principles of Magna Charta and the common law. The taking of private property for public purposes without notice to the owner is a taking without "due process of law." *Burns vs. Multonomah R. Co.*, 15 *Fed.* 177.

Where a state constitution merely provides for compensation, where lands are taken for public purposes without specifying the mode of determining the compensation, the matter is left to be regulated in such manner as may be provided by law, but the discretion vested in the legislature is not an unlimited one. An act for the condemnation of land for a State road appointed three private citizens as commissioners, without the consent of the parties interested, to determine the compensation. No notice of the proceedings before the commissioners was provided for, and the land owner was not authorized to appear at any stage of the proceedings and object to the commissioners, or to introduce any proofs or allegations before them. Held that the act was void.

Langford vs. Commissioners, 16 *Minn.* 375.

In the case of *Kaukauna Water Power Co. et al. vs. Green Bay & M. Canal Co.* 142 *U. S.* 254 the question arose whether the act of the legis-

lature of Wisconsin of August 8, 1848, providing that the water power created by a certain dam should belong to the State, was invalid, in that it took private property for a public purpose without due process of law, because the act did not provide a method for ascertaining and making compensation for the property so taken. Justice Brown says (p. 272):

"There is no doubt under the facts of this case, that the owner of lot 5 was entitled to compensation for the land appropriated by the State in the construction of the dam and of the embankment in the front of his lot. To what extent he was entitled to the use of the water power created by the dam as against the public, may be difficult of ascertainment, nor is it necessary to answer the question in this case, since it appears that whatever this property is it has been appropriated and no provision made for the compensation of the owner. So far as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments or for the overflow, or so far as water was diverted from its natural course or from the use to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation." ***

No more can be required on this point.

Appellants do not seem to quarrel at the jurisdiction assumed because of there being no adequate remedy at law by which to get an ascertainment of damages, nor to prevent a multiplicity of suits, unnecessary vexation, delay, and costs.

*** The doctrine so well asserted in Bonaparte vs Camden &: Bald. C C 205-33; and Martin Ex parte 13 Ark. 198 sustains all that is claimed here for the right of injunction, and as to the taking of this property without compensation.

It is apparent from the complaint and admitted by the demurrer, that the road, if this work is carried out, is absolutely broken,—it is not the road it was intended to be, and it ceases to be for any purpose and all purposes the great connecting thoroughfare its charter contemplated; and therefore, as a logical sequence, the result cannot be computed in dollars and cents; and a further legitimate deduction follows, that were this damage ascertainable, the suits to accomplish this would be countless, the delay limitless, and the costs almost beyond calculation; hence there can be no better place for equity to step in and arrest the mischief at once.

A discourse on the rights, duties and liabilities of the Crown in England, in connection with the dominion of the shore, would, we believe, serve no good purpose here. The analogy therein and in our system is so dim and remote, any ray of light emitted from that direction would be so feeble and flickering as, probably, to confuse and not enlighten the court. These matters under our plan of government, federal and state, are most fully presented outside of the discussion herein, in the arguments in the other cases already referred to, and in the *appendix* to this brief. Indeed, no just accusation can be made and sustained, that there has been any dearth of argumentation on these points, before

this court for the last two months, but quite the contrary; if the court has been hungering after an unfolding of these questions, no one can say truthfully this craving has not been satiated to the utmost.

We have not followed precisely the order of appellants' counsel in his brief, wherein he expresses his professional dissatisfaction with and displeasure at the ruling of the court below, but we believe we have brought before the court the salient points, directly or by reference to arguments in other cases pending here, which uphold that decision in favor of appellee.

We respectfully attach to this, as an *appendix*, the brief by appellee's counsel before the harbor line commissioners, when they were first taking steps to do the work under the law creating the board.

It will be found to contain a very forcible and persuasive discussion of the questions at issue, and we request the court to consider it as part of our brief; and we submit the case by asking an affirmance.

Respectfully,

JAMES McNAUGHT and
A. H. GARLAND,
For Appellee.

APPENDIX.

BEFORE THE HARBOR LINE COMMISSIONERS OF THE STATE OF WASHINGTON, IN SESSION AT OLYMPIA, OCTOBER 12th, 1891, IN RE HARBOR LINES IN THE HARBOR OF THE CITY OF TACOMA.

IN THE MATTER OF THE CONTENTION

OF THE

NORTHERN PACIFIC RAILROAD COMPANY,

THAT THE

LIMITS OF THE RIGHT OF WAY OF ITS MAIN LINE OF RAILROAD AND TELEGRAPH, AS GRANTED BY ACT OF CONGRESS, EXTEND TWO HUNDRED FEET ON EACH SIDE OF THE CENTRE OF SAID LINE AS THE SAME IS CONSTRUCTED AND IN OPERATION ALONG THE HARBOR FRONT OF THE CITY OF TACOMA.

Statement of Points and Authorities on behalf of said Contention.

TO THE HONORABLE, THE BOARD OF HARBOR LINE COMMISSIONERS OF THE STATE OF WASHINGTON:

In presenting this matter to your attention it is not the intention to enter upon that general,

wide field of discussion which you gentlemen consider closed by the decision of the highest Court of this State.

What is now presented has never been before any Court of this State for consideration, and arises exclusively and distinctly from the peculiar nature of the creation and existence of the Northern Pacific Railroad Company.

FIRST.

PUBLIC PURPOSES INTENDED TO BE SUBSERVED BY CREATION OF THIS PARTICULAR CORPORATION.

All railroad corporations have imposed upon them, by reason of the particular business in which they are expected to engage, certain well known public duties and responsibilities; many of these are in addition to those which are incidental to other public and common carriers.

It is frequently said that these public duties are imposed because the railroad corporation has been clothed, by the law, with certain rights and powers not accorded to individuals or other classes of corporations. It is just as true to say that these exceptional rights and powers are given to enable the railroad corporation to properly perform its public functions.

The public duties and responsibilities imposed upon the Northern Pacific Railroad Company

are not confined to those which are common to all public or common carriers, nor are they merely those which are incidental to railroad corporations generally, but, in addition to all these, they include all those specifically enumerated by the special Act creating this particular corporation.

The Act of Congress by which this company was chartered not only imposed *specific duties* and *responsibilities* of a public character, but confers by special designation certain "*grants, rights* and *privileges*," and authorizes the exercise of certain *powers* and *prerogatives* which are expressly delegated for certain purposes and uses. It goes even further and grants certain *immunities* and *exemptions*.

13 *Stat.*, 365.

These are all public functions, inasmuch as the uses and purposes for which they are to be exercised are of a public character and in the exercise of these functions for the accomplishment of the uses and purposes designated, the corporation is as much a public concern as is the state or municipality in the exercise of their respective functions.

If, in creating this corporation, it was only intended, that it should serve the purposes, or be devoted to the uses, common to all railroads, it could just as well have been created under some general incorporation act of any state or terri-

tory through which it might have been located; but as it was designed to be a transcontinental, inter-state road, Congress gave it certain peculiar rights and privileges, and clothed it with specific powers, not generally conferred upon, or accorded to, other railroad corporations.

Wherever in the act any of these grants, rights, privileges, or powers are enumerated as having been expressly conferred or authorized, there follows a statement of reasons for granting the right or privilege, or conferring the power or authority, viz.: a statement of the uses and purposes which render it necessary.

Congress, in the act chartering this company, not only specified what was to be built, who was to build it, where, in a general course and direction, it was to be built, but why and for what purpose it was to be built; that act also specified with what it should be vested to accomplish such purpose.

A railroad and telegraph line was to be constructed; the Northern Pacific Railroad Company, composed of the several persons named in the act, "and all such other persons who should "or might be associated with them or their suc-"cessors," were "authorized and empowered to "lay out, locate, construct, furnish, maintain and "enjoy" the railroad and telegraph line so to be constructed. This continuous line of railroad and telegraph was described as "beginning at a "point on Lake Superior, in the State of Min-

"nesota or Wisconsin; thence westerly by the "most eligible railroad route as should be deter- "mined by said company within the territory of "the United States, on a line north of the 45th "degree of latitude, to some point on Puget's "Sound, with a branch by way of the Columbia "River to a point at or near Portland in the State "of Oregon, leaving the main trunk line at the "most suitable place not more than three hundred "miles from its western terminus." There was the express declaration that it was vested with "all the *powers privileges* and *immunities* neces- "sary to carry into effect the purposes of the act "as therein set forth." (All of the foregoing specifications are to be found in section 1 of said act, *supra.*)

These purposes were enumerated as follows: "To secure the safe and speedy transportation "of the mails, troops, munitions of war and public "stores over its routes" (see sec. 3); it was to be "a post route and a military road subject to the "use of the United States for postal, military, "naval *and all other government service*," and it was to be "subject to such regulations as Con- "gress might impose restricting the charges for "such government transportation" (see sec. 11). All of these purposes were finally expressed in one grand resumé designated as the "object of "the act," that is, "to promote the public inter- "ests and welfare," which was to be accomplished, "by the construction of said railroad and tele- "graph line." Further, "to secure to the gov-

" ernment at all times (but particularly in time of " war) the use and benefits of the same for postal, " military and other purposes;" which was to be accomplished by " keeping the said railroad and " telegraph line in working order" (see sec. 20).

Congress, in creating this corporation, was not content, merely, with stating the purposes for which it was created, but having vested it with the rights and powers necessary to enable it to accomplish these purposes, was most anxious that the road should be built in such a manner that the company could properly exercise these rights and powers, and, therefore, required that said road should be " Constructed in a substan- " tial and workmanlike manner, with all the neces- " sary draws, culverts, bridges, viaducts, crossings, " turnouts, stations and watering places, and all " other appurtenances, including furniture and " rolling stock, equal in all respects to railroads " of the first class when prepared for business, " with rails of the best quality manufactured from " American iron;" also that " an uniform gauge " should be established throughout the entire " length of the road," and that there should be constructed " A telegraph line of the most sub- " stantial and improved description, to be oper- " ated along the entire line." (See sec. 5.)

If Congress, in creating this corporation, had made no express specific statement whatever of the peculiar nature of the corporate existence, and had made no specification whatever of the particular uses to which it was devoted, we would

still be able to recognize the corporation itself as having characteristics and incidents distinguishing it from the ordinary railroad corporation created by general incorporation act. The debates in Congress during the consideration of the bill, which subsequently became a law in the form of this act, are part of the well-known public history of this country, and those engaged in them were but voicing public clamor and demand for land-grant, transcontinental roads, which should bring into closer contact the remote parts of the country, and which would establish that harmony of relation then so much desired, and also stay the increasing tendency towards disunion and the separation of parts which it was fondly desired should constitute one united whole. We were not then seeking to enlarge our boundaries or extend our limits, but to make our country one without limit. The Union Pacific, the Central Pacific and the Northern Pacific Railroad Companies were the result and outgrowth of this popular demand. The peculiar emergency which gave rise to the creation of these companies and the construction of their respective roads does not now exist, but the existence of a rival road since constructed through the provincial possessions of the British Empire lying north of us, whereby troops and munitions of war of the English government can have safe and speedy transit to the very confines of our unprotected western border, makes it necessary that the Northern Pacific Railroad Company should still retain the peculiar public functions

established for it at its creation by the act of Congress, and that it should remain the public concern that Congress originally made it. The company itself would fail in the performance of its duties to the government which created it, and would violate the provisions which were made and still remain in force, controlling and directing its conduct and operations in aid of the government, if it should either voluntarily alienate or dispose of, or cease to use, occupy or exercise any portion, or any of the facilities, rights, powers or privileges granted to it for the promotion of the public welfare; or if it should allow or acquiesce in the curtailment, by any authority other than the United States government itself, of any of these privileges, rights or powers.

SECOND.

THE NATURE AND EXTENT OF THE RIGHT OF WAY TO THE COMPANY.

The right of way held by the company inures to it by virtue of the provisions of Section 2 of the Act of Congress creating said company, which are as follows: "And be it further enacted, that the right of way through *public lands* be, and the same is hereby granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph line as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands

"adjacent to the line of said road, materials of "earth, stone, timber and so forth, for the con- "struction thereof. Said way is granted to said "railroad to the extent of two hundred feet in "width on each side of said railroad where it "may pass through the *public domain*, including "all necessary ground for station buildings, work- "shops, depots, machine shops, switches, side- "tracks, turn-tables and water stations."

The grant of right of way thus made is not subject to any rights or claims, the perfection of which was not consummated prior to the date of the grant, viz., July 2, 1864. The decisions of the higher Courts of our country give full construction and explanation to this section of the company's charter. The grants of right of way made to the Union and Central Pacific Railroad Companies, as well as to those made to many other land grant and transcontinental companies, are similar in all respects to those made to the Northern Pacific Railroad Company.

Justice Field of the U. S. Supreme Court, rendering the opinion in the case of *Railroad Co., vs. Baldwin, reported in 103 U. S., 426*, in passing upon a grant of right of way made upon the same terms, and to the same extent as the one now in question, said: "The grant of the right "of way by the sixth section contains no reserva- "tions or exceptions. It is a present absolute "grant, subject to no conditions except those nec- "essarily implied, such as that the road shall be

"constructed and used for the purpose designed. "* * * The right of way for the whole distance "of the proposed route was a very important "part of the aid given. If the company could be "compelled to purchase its way over any section "that might be occupied in advance of its loca- "tion, very serious obstacles would be often im- "posed to the progress of the road. For any "loss of lands by settlement or reservation, other "lands are given; but for the loss of the right "of way by these means, no compensation is "provided, nor could any be given by the substi- "tution of another route. * * * We are of "the opinion, therefore, that all persons acquir- "ing any portion of the public lands, after the "passage of the Act in question, took the same "subject to the right of way conferred by it for "the proposed road."

This case involved the grant of a right of way to the St. Joseph & Denver City Railroad Company, made by act of congress, July 23, 1866, 14 Stat, 210. The line of the road was not definitely located until October, 1871. A suit for damages was brought by an owner of land through which the road was constructed, with a view of obtaining compensation for the land taken for right of way for the road, and for the damage to the adjacent land as against the Government by obtaining a patent in October, 1869, and it was contended that the grant of the right of way took effect only from the date at which the company filed its maps designating the route with the secretary of the interior. Al-

though the District Court, and the Supreme Court of Nebraska agreed with him, the Supreme Court of the United States took the opposite view, and held the land-owner's rights in the land were subject to the rights which accrued to the company by virtue of the grant, which took effect at the date thereof, viz., July 23, 1866, and notwithstanding the road was not constructed until years after the land-owner obtained his patent, which latter, of course, did not contain any express reservation in favor of the company, and no reference to any previous grant of any portion of the land. This establishes the fact that the grant of right of way was a contract executed as of the time of the passage of the act, making the grant; also that the grant was not merely a law establishing a contract, but amounted to a conveyance equivalent to a patent, and as will hereafter be shown, such a conveyance as was of greater force, and higher authority than a patent; because proceeding from a more authentic source, and not being subject to attack directly or collaterally after the act making it a law had once passed and received approval.

The grant of right of way made to the Northern Pacific Railroad Gompany has also received direct construction and explanation by the courts in cases to which that company was a party.

In the case of *Wilkinson v Northern Pacific Railroad Company*, decided by the Supreme

Court of Montana, January 29, 1889, reported in 6 *Pacific Reporter*, 349, the very land upon which the company constructed its road had been held, worked and claimed by the land-owners as placer mining ground for years prior to the construction of the road through the land owned by them. The limits of the right of way as taken by the company for the construction of its road at that point had been known for years as containing valuable placer mines, having deposits of mineral sufficient in quantity and of sufficient marketable value to justify the development and working of the same. The lands were located for mining purposes, and under the mining laws in 1868; in February, 1882, up to which time they had been worked continuously, a patent was applied for and the lands paid for as the law required. In April, 1882, the company commenced the construction of its road over the lands, tore up the ground and water ditches so that they were unfit for use as mining ground, and made it impossible to take gold therefrom. This was the condition for the distance of about a mile and a half through the land. A patent was issued to the land owners May 31, 1883. This patent contained no reservation or exceptions in favor of the company. The supreme court in affirming the judgment of the district court dismissing the action, and denying the right to recover damages, said: "The appel-
"lants take the position that they have the legal
"title, a patent, which is voidable only when set
"aside by a court of competent jurisdiction; and

"that having this title, they have a right to the "appointment of commissioners. But the re- "spondent has also a legal title, of an older date, "which is found in the act of congress making "the grant, and the inferior must yield to the "superior legal title, without a resort to a court "of equity to set the inferior to one side."

The land-owners also claimed that by express provision of the company's charter the mineral lands were excluded from the operation of this grant. To this the Court made the following answer : "The mineral lands excluded from the "operation of this act are evidently not those "covered by the right of way, as nothing could "possibly be given in lieu of any lands which "might be needed for such purpose; and it "would be destructive of the rights of the rail- "road company if mining claims could at any "time be located and worked upon the track "and land covered by the right of way."

The land owners then contended that Congress had, by a law then in force, declared that no act should be so construed as to embrace mineral lands. The answer of the Court was as follows ;

"The joint resolution of Congress of January "30, 1865, declaring that no act shall be so con- "strued as to embrace mineral lands, which in all "cases shall be and are hereby reserved exclusive- "ly to the United States, cannot be considered as "a reservation of mineral lands from the opera- "tion of grants of the right of way, such as the

" one in question. A reservation of that charac-
" ter would annihilate the franchise, and annul the
" operation of the entire act of Congress granting
" the charter." And the Court said in concluding:
" The operations of mining and the business of
" railroads, can not be conducted at the same time
" upon the same ground; and a reservation of such
" a character would beget a conflict of rights and
" a confusion of interests not in contemplation
" of intelligent legislative action."

It may be proper in this connection to state, that it is apparent from all authorities on the subject, that it has been firmly established, not only by the course of legislation, the methods and policy adopted by the general government, and the like precedents, but by the decisions of the courts, that a grant of right of way of this character is not subject to any previous general or special reservation where the same has not taken effect, or been perfected, acted upon, ascertained, or made definite and certain by location, prior to the specific direct grant itself. And this is true whether the previous reservation was made by legislative enactment, or arose in the course of, or by virtue of, the organization of the government itself. (Of course it is not necessary to discuss the question as to the effect of a reservation, the inception of which was subsequent to the date of the grant).

Although this subject will receive attention hereafter in another connection, we at this time call attention to one decision which has an im-

portant bearing, and which is more properly referred to now. The case in which it was rendered was that of the *Union Pacific Railway Co. v. Douglass County*. The opinion was by Brewer then sitting as United States Judge of the Circuit Court, for the District of Nebraska, (now one of the justices of the Supreme Court of the United States). The case will be found reported in 31 Federal Reporter, 540. The main question involved was whether the Union Pacific's grant of right of way was operative upon sections 16 and 36, the sections granted for school purposes to the state of Nebraska. In 1854 the organic act creating the territory of Nebraska was passed, (10 Stat. 277), in which, by section 16, it is provided that when the lands within said territory shall be surveyed under the direction of the United States, preparatory to bringing the same into the market, "Section number 16 and 36 in each township, in "said territory, shall be and the same are hereby, "reserved for the purpose of being applied to "schools in said territory, and in the states and "territories hereafter to be erected out of the "same." The Union Pacific Railway Company's Act, passed July 1, 1862, 12 *Stat.*, 489, provided, in Section 2, that "the right of way through the "public lands be and the same is hereby granted "to said company for the construction of said rail-"road," etc., and was, as heretofore stated, in all respects similar to the grant made to the Northern Pacific Railroad Company two years later. The grant to the Union Pacific Railway Com-

pany, however, was later than the reservation for school purposes. The Court, in referring to this fact, said: "But the power of Congress over "lands of which the fee has not already passed "and vested is unquestioned." The court then calls attention to the case of *Frisby v. Whitney*, 9 *Wallace*, 187, stating that the Supreme Court of the United States in that case had held that until the title to the pre-emptor had actually vested the power of Congress was supreme. The court also cited the case of *State v. Bachelder*, 1 *Wall*, 109, and contended that in that case the same doctrine was applied in respect to school sections. The court further proceeding then said: "The power of Congress then being be- "yond dispute, the single question is as to the in- "tent, and here I am met with a proposition that "the term 'Public lands' has become by settled "construction descriptive of those lands only "which are in no manner reserved for any pur- "pose." The court then refers to the case cited by the counsel appearing adversley to the Railway Company, viz. the case of *Wilcox v. Jackson*, 13 *Peters*, 498. The court then reads the following language from that case, special reference having been made to same by counsel, viz: "But we go further and say that whensoever a "tract of land has once been legally appropriated "to any purpose, from that moment the land thus "appropriated becomes separated from the mass "of public lands, and that no subsequent law or "proclamation, or sale would be construed to em- "brace or to operate upon it, although no reserva-

" tion were made of it." Judge Brewer then commented upon this language, and further said: " This language, which is very broad, must be " construed in reference to the facts of that case, " and there it appeared that land had been re- " served for military purposes, and it was held " that a subsequent act for the sale of lands in " that territory did not operate upon this particu- " lar reserved tract. This only goes to show that " whenl and has been once reserved Congress will " not be presumed to have intended disposing of " it in any other way, unless the intent is clearly " expressed." He further proceeds to say that the principle just referred to did not meet the question involved in the case which he was then deciding, and proceeds to show that the grant of right of way to the Union Pacific Railway Company was not such a grant as the Supreme Court of the United States was referring to in the case from which he had just read, but of an entirely different character, and, therefore, questions arising thereunder were to be determined upon different principles. Further, in the course of his opinion, he said: "Further I observe that " the Union Pacific Railway Act contemplated a " speedy construction of the road. The state of " Nebraska was not then admitted to the Union, " and there was no certainty that it would be. " Again, no provision is made for condemning the " right of way over school sections, nor is it easily " to be perceived how, under the statute then in " force, proceedings could be had for such con- " demnation. Still, again, this right of way

" through school sections has been accepted with-
" out challenge for twenty years. This indicates
" the general understanding, and is significant."
The Judge then concluded by saying there was no doubt Congress intended by the act granting the right of way to the Union Pacific Railway to grant it through the school sections.

It is a well known fact, deducible from history, that all acquisitions of territory, now included within the United States, whether by conquest or purchase, were attended with the general understanding and implied condition that there should be reserved to the people within said territory Sections 16 and 36 in each township, for the benefit of education, or, as it is generally termed for school purposes. This arose by force of custom which was finally adopted as the settled policy of all American Government, and, to interpolate a few words of Judge Brewer, " has
" been accepted without challenge" from the earliest history of our government, and the doctrine was as much applicable to the country included within the limits of what afterwards became the territory of Nebraska as to any portion of the country now within the limits of the United States. Then the declarations contained in the provisional articles adopted for the organization of what was afterwards designated the " Northwest Territory " did not announce anything new in the policy of the government for the establishment of law. It was merely declaratory of what had always been. Just so was the Act of Congress declaring a reservation in favor of the

State of Nebraska. It did not add or take away, with regard to the status of school lands in the State of Nebraska, anything more than did the constitution of the State of Washington, with reference to the status of tide lands, when it made the declaration contained in Section 1 of Article 17, asserting the ownership of the State of Washington in the tide lands within the limits of the State. About the only distinction that exists between the character and nature of tide lands and that of school lands, is that the latter is fixed beyond a question, while the former, as may appear later, is a question very much in dispute, the dispute being attended with the possibility of final determination against the State, notwithstanding the apparently confident assertion contained in the Constitution, which seems to have been made *mainly in view of the doubt* in which the question was involved, and under circumstances very much akin to those which prompt "a man to whistle while passing a graveyard." In fact, of the three special classes of lands concerning which an exception is supposed to have been made in the organization of our American government, viz: School lands, tide lands, and saline lands, more definite corroboration of history attaches to school lands than either of the others. If this be true the doctrines announced by Justice Brewer in the case referred to will be more applicable to tide lands than to school lands.

Returning again to the precise question of the nature of the grant of right of way to the Northern Pacific Railroad Company, we call at-

tention to the construction given to that grant by our own courts during the time we were a territory. In the case of *Andrew C. Gervais v. Northern Pacific R. R. Co.* decided in the Territorial District Court at Yakima City, May 29, 1885, Judge Turner used the following language: "I am of the opinion that all persons acquiring "public land, under the homestead or pre-emption "law, the inception of whose rights was after July "2, 1864, took their land subject to the right of "way through the public lands granted to the "Northern Pacific Railroad Company by Act of "Congress of July 2, 1864; that the grant of "such right of way does not lapse by reason of "the default of the company in performing any of "the conditions of the said act, until some affir-"mative action is taken by the government to for-"feit the same, and that until such action by the "government no individual can complain of such "default even though he may have acquired lands "from the government which are entered by the "company in the construction of its road." In that case it appeared that the settlement was made in 1862, a homestead filing was made in 1869, final proof was made in 1874, shortly after which a patent was issued by the government. The construction of the road through the land was commenced in 1885, or about ten years after the patent issued. At least these are the facts as appeared by the petition at the time that the decision of the judge referred to was rendered. Further along in his decision the judge said: "I "am of the opinion that this petition does not

" show the inception of a right which afterwards " ripened into title before July 2, 1864." About 12 other cases involving substantially the same facts were decided in that court at about that time, since which time the doctrine announced has never been questioned in this state.

In addition to the case stated, there are many others in which decisions have been rendered upon not only this company's grant of right of way, but upon other grants of a similar character. We shall content ourselves with merely citing these cases without quoting from them, as they refer to the nature of the grant in a general way. It may be said, however, that they also decide what proceedings the company may institute for the protection of its right of way, and how the company's rights may be maintained by such proceedings. A perusal of the decisions in these cases may be of some interest in giving a complete knowledge of the character of this grant. The cases are :

Western Pacific R. R. Co. v. Tevis, 41 *Cal.*, 493.
Doran v. Central Pacific R. R. Co., 24 *Cal.*, 246.
Southern Pacific R. R. Co. v. Burr, 24 *Pac. Reporter*, 1032.
Southern Pacific R. R. Co. v. Meyer, 24 *Pac. Reporter*, 1033.
R. R. Co. v. Benity, 5*th Sawyer*, 118.

In the Burr case above stated, the court said : " Here there was a special grant of right of way,

" 200 ft. in width, on each side of the road. This " grant is a conclusive legislative determination of " the reasonable and necessary quantity of land to " be dedicated to this public use, and it necessar- " ily involves a right to possession in the grantee, " and is inconsistent with any adverse possession " of any part of the land embraced within the " grant. It is true the strip of land now actually " occupied by the road bed and telegraph line may " be only a small part of the 400 ft. granted, but " this fact is of no consequence. The company " may at some time want to use more land for " sidetracks or other purposes, and it is entitled " to have the land clear and unobstructed when- " ever it shall have occasion to do so."

Speaking now more particularly with reference to the extent of the company's right of way, the history of the location and construction of the road, while not important, is, perhaps, incidentally material.

Section 12 of the charter, among other things, provides as follows: "That the acceptance of " the terms, conditions and impositions of this " act by the said Northern Pacific Railroad Com- " pany shall be signified in writing, under the " corporate seal of said company, duly executed " pursuant to the direction of its board of direct- " ors first had and obtained; which acceptance " shall be made within two years after the pas- " sage of this act, and shall be served on the " President of the United States."

On March 6, 1865, Josiah G. Perham, president of the company, by its direction, served upon the President of the United States the required acceptance as provided, and at the same time, under the same direction, forwarded to the Secretary of the Interior a map of the general route of the road from a point on Lake Superior to a point on Puget sound, and in an accompanying communication said: "Under authority "from the board of directors of the Northern "Pacific Railroad Company I have designated "upon the accompanying map, in red ink, the gen- "eral line of their railroad, from a point on Lake "Superior, in the state of Wisconsin, to a point "on Puget sound in Washington Territory, by "way of the Columbia river, adopted by said com- "pany as the line of its railroad, subject only to "such variations as may be found necessary after "more specific surveys." The line of route indicated on this map ran in a westerly direction, was wholly north of the 45th degree of north latitude and within the territory of the United States, as it was provided by the act that it should be.

On May 31st, 1870, a joint resolution, passed by Congress was approved by the President of the United States, authorizing the company to issue bonds for the construction of its road as follows: "and also to locate and construct, un- "der the provisions, and with the privileges, "grants and duties provided for in its act of incor- "poration, its main line to some point on Puget

" sound via the valley of the Columbia river, with " the right to locate and construct its branch upon " some convenient point on its main line across " the Cascade mountains to Puget sound." By virtue of this resolution whatever may have been the main line or branch line of this company prior to the adoption of this resolution the latter fixed what was to be the main line and what the branch from that time forthwith. On the 13th of the following August the company filed with the Secretary of the Interior, and with the commissioner of the General Land Office another map showing the general route of its main line from a point on Puget sound, following almost identically the same route as that indicated on the map filed March 6, 1865. That the company afterwards, on September 12, 1873, filed its map of definite location of the line of its road from Kalama to Tenino in, what was then Washington Territory, a distance of 65 miles. In 1871,'72, and '73 the company constructed its line of railroad from Kalama, on the Columbia river, in a northerly direction to Tenino, the distance above mentioned. That the portion of line of road from Tenino to Tacoma was constructed in 1874, and a map of its line as so constructed was afterwards filed on May 14, 1874. That at about said date, or shortly thereafter, during said year, commissioners appointed by the President of the United States, in pursuance of the provisions of section 4 of the original act of incorporation, examined said road so constructed to Tacoma, and reported to the President that the same had been

constructed and completed in a good, substantial and workmanlike manner, and in all other respects as required by the act, and their report was accepted by the President of the United States. That the portion of the road from Kalama to Portland, Oregon, was fully constructed and completed in the year 1883, and was shortly thereafter in the same year examined in the same way, and report of such examination accepted. That the entire line of the road from Portland to Tacoma was examined, reported upon, and the report accepted, prior to the year 1884. That the Commissioners appointed to examine the 25 mile section running into Tacoma, reported that it was constructed to a point in Section 32, T. 21, N. R. 3 E., but no particular, definite point in said section was designated. That no particular or definite designation of the termination of any of the 25 mile sections examined was ever made by any commission appointed by the President to make such examination, but the reports of said commissions merely specify the point of conclusion of their work, as a point, not named or designated, within a particular section of a given township, and that the commission which made the examination and report thereof relative to the 25 mile section of the main line into the city of Tacoma, followed the same course that had been pursued in reference to the examination of all sections upon the line of road, but at the time of the examination of said section of road, and the acceptance thereof by the Presi-

dent, and at the time of filing the map of constructed line of said road, as heretofore stated, the said line of railroad extended along the deep water front of the city of Tacoma, and out over what were then tide lands, and below the line of extreme high tide on Commencement Bay, in said harbor, for a long distance as shown upon the map heretofore filed with your Honorable board, but for the greater part of said distance there was not and is not now, and never has been any deep or navigable water sufficient for any of the ordinary purposes of commerce, or to allow transhipment of freight or passengers from vessel to car or from car to vessel; and that at the time said road was constructed and completed in 1874, and as it was when examined by said commissioners, it extended down to where there was water of sufficient depth to accommodate and make possible such transhipment. That it was not practicable nor possible to locate bunkers for the discharge, loading and shipment of coal, nor warehouses for the loading, discharging, shipment and transhipment of general freight, or warehouses for the receipting, loading and shipment of wheat, at any point east of the point where the line of road first reached available deep water navigation, as such facilities could not be operated or maintained for the purposes for which they were designed in connection with loading and unloading from car to vessel and from vessel to car, unless they were located along the line of the road as completed in 1874, and as it was, when examined by said

commissioners, extended beyond the point where it first reached deep water navigation, as far beyond said point as was then necessary to accommodate the general freight and coal shipping business, and was not extended beyond what was necessary to accommodate such business. That the only extension that was made of said line since the time of the examination and report of said commissioners was made for the purpose of providing for the transhipment from car to vessel of wheat shipments. That at the time the main line was constructed from Portland to Tacoma, and completed and examined by the Commissioners there was no wheat grown in the State of Washington for shipment, and it was not possible or practicable to make shipments of wheat to Puget sound until the completion of the company's Cascade Branch to Tacoma. That since 1886, when that branch was completed, wheat shipments have been made to Puget Sound, over said branch, and transhipped from rail to vessel along the deep water front of Commencement Bay harbor. That it was not possible to locate facilities for such transhipment or for storage awaiting shipment by vessel, after delivery by rail, at any point east of the termination of the company's line as completed and examined in 1874, for the reason that all the available space along the water front, where there is a depth of water sufficient for the ordinary purposes of navigation, was already occupied by facilities, wharves, warehouses and coal bunkers, constructed and established for the

accommodation of general freight and coal shipments and transhipments, and it was necessary for the storage of said wheat, while awaiting shipment by vessel, and for the purpose of transhipment, that special facilities should be designed with reference to that particular business and used for it exclusively, and it was necessary for the convenient and proper handling of that business, as well as of the business of general freight and coal shipments, that the facilities for handling wheat should be established away from the place of handling said coal and general freight shipments, and upon other wharves and docks specially designed for that purpose. That consequently, said facilities designed for said wheat shipments were required to be and were constructed to the westward of the said general freight and coal business facilities, and further along on the deep water front. That it was necessary to carry the tracks and other railroad facilities down to the point where such wharves and warehouses were established for the accommodation of said wheat shipments. That no more of said facilities, either of warehouses, wharves, or of extended tracks, were established than were necessary to accommodate the business of said wheat shipments and transhipments. That said facilities, wharves, warehouses and extended tracks are not now sufficient to properly accommodate the volume of business done and necessary to be done by said company, along said deep water front, or at points where there is a sufficient depth of water for the ordinary

purposes of navigation and transhipment. That the said extensions of said road beyond the point of termination of said company's line of road, as completed in 1874 and examined by commissioners, are made to accommodate the proper and necessary terminal facilities before mentioned, and such as the company had a right to make in the exercise of the discretion lodged with its Board of Directors by the act of its incorporation, and are such as are reasonable and as in good faith ought to be established, being within both the letter and the spirit of the law creating said company, and such as by a proper construction of said law are fully authorized and sanctioned. That the company has not gone beyond what it was authorized in good faith to do by its charter, inasmuch as it has never made any extensions beyond what was necessary and proper to be made for the handling of the business before mentioned. That when the company was desirous of reaching points to the westward of the extensions hereinbefore mentioned. to secure business from establishments further along upon said water front to the westward, it did not make any extension of its own line for that purpose, but brought about the organization of another and independent corporation, which constructed and which controls and owns the line of railroad which connects with this company's line at the point of termination of the facilities established for the shipment and transhipment of wheat, as heretofore mentioned. That said line of railroad so connecting with

this company's line of road extends from the point of connection aforesaid for a distance of three miles along the water front, extending westward from said point of connection with this company's line of road; that said line of railroad is not operated as an extension of its line of road, but by virtue of a lease or traffic contract which this company has of such line of road, and which it was obliged to take in lieu of any extension of its own road in order to get down to the established places of business along said water front beyond the point of termination of its line of road. That the Washington Short line railroad company is the company owning and controlling the road connecting with this company's line of road, as hereinbefore mentioned, and is a corporation organized under the laws of the territory (now state) of Washington. That all of the important facilities and valuable improvements of this company upon and along that portion of its line of road, extending beyond the point where the same was completed and examined by commissioners in 1874, including the extended track itself, are all included within the section mentioned in the report of said commissioners as the section in which the point of termination of said road as completed at the time they examined it, should be. That it was not possible for this company to designate upon its maps of general route of said line of road into Tacoma, nor upon the map of constructed line thereof, the precise point at which said line ter-

minated within the section in which it did terminate. That it was not possible for the commissioners who examined said constructed road to definitely designate such point, nor was it practicable to do so for the reason that the exigencies of the company's business would undoubtedly require such an extension as in good faith could be made for a reasonable distance; and such as would subserve the purposes for which the company was created, and which would enable it to carry out the designs which the government had when it made the grant, and authorized it to act in accordance with its terms. The commission when they reported to the president of the United States, and he when he accepted their report, had this certain outcome in view. It was no mere contingency. It was known and fully understood by every one authorized to act, that such a reasonable extension would have to be made, and the company made it, in entire accord with the provisions of the act which contemplated it. All that portion of the tide lands on which is located that part of the line of the company's road lying east of the point where it first reaches water of sufficient depth for ordinary navigation, has heretofore been filled in, and made solid ground, and all of the intervening space between such portion of its main line and the upland, has also been filled in in the same way, and it has also made solid ground, by filling in all that land lying on the outside of that portion of its main line where it has utilized any of said space for the establish-

ment of any of its facilities. It has now about practically completed all of the work of said filling, so that all of the space included within its main line and the outer margin of its 200 ft. space of right of way, along on the outside of the main line, has been made solid ground down to the point of available navigation. That the company has heretofore placed, and has now upon its right of way, extending along the water front of Commencement bay, improvements amounting in value to about two million of dollars; that all of the same are such as are proper and necessary in the conduct of the company's railroad business; that most of said facilities are located upon the outside of said company's main line, because there is not room on the inside thereof for the reason that said line of road runs along a high, abrupt and very steep bluff along the entire distance of said water front; that it was not possible for this company to have constructed its line of railroad up over said bluff and down to tide water, owing to the engineering difficulties in the way. That the company completed its Cascade branch from Pasco to Tacoma about the year 1886, and the same was shortly thereafter examined by commissioners whose report was accepted by the president of the United States. That by reason of the connection of the said Cascade branch with the company's main line at Pasco, this company has had ever since the year 1886, a through line from Lake Superior to Puget Sound, as provided by the act of its incorporation, and also in

addition thereto its main line by way of the valley of the Columbia River to Portland, Oregon, as provided for in said incorporation. That the Cascade Branch as constructed and completed, connected with the main line on the water front of Tacoma, some considerable distance east of the point of available navigation, and at a point where there was never any navigation at low water, for even the smallest of water craft. That from about the point where the main line, or what is known as the company's Pacific Division, extending from Portland to Tacoma, strikes the first available deep water navigation, to the termination of the line of road as now constructed, the main track lies inside of the government meander line, but some improvements extend out beyond said meander line but within the limits of the company's right of way.

It may be said further, in connection with the matter of extension of the company's line beyond the point as originally completed and examined, that the filing of maps of general route, of definite location, and of constructed line, and the examination and report by commissioners, were not required for the purpose of determining the limits or extent of the right of way, because the latter would attach to the line of road as constructed in good faith, and within reasonable limits, but these requirements were for the purpose (as expressly stated in the act itself), of enabling the government to determine within what limits lands should be reserved from sale and

patented to the company on either side of the line of the road coterminus therewith. In making the grant of lands Congress did not divide up odd sections lying on either side of the line of road, as constructed or to be constructed, and within limits of the grant, but the grant, as expressly stated in sec. 3, was of *every* alternate section of public land, not mineral, designated by odd numbers. That if the road as completed, at the time of being examined and accepted, had only extended to the centre of the section in which it was designated as ending, and that had been an odd section, there would have passed, as part of the grant to said company, every particle of that odd section, just the same as if the line had extended clear through it, and if the point of termination, or rather of then completion, was at the centre of an even section, the adjacent or alternate odd section, lying adjacent to it on either side, would all go to the company in its entirety as a part of the grant. If that is so with the land included within the limits of the grant, why should any objection be made to extension of the line of road continuously to the furthest point in that section, especially as no particular point in that section was mentioned as its termination in the report of its examination.

The consideration of the nature and extent of the right of way involves the questions: What did Congress grant as right of way; over what character of lands did it extend, and what did it

include? These we now consider, regardless of the further question whether Congress had authority to grant what it did grant. Section 2 of the act makes declaration of the grant in two or three different ways: first, the right of way is granted *through* the *public lands* for the *construction* of the road; second, there is conferred upon the company the *right, power* and *authority* to take from the *public lands adjacent* to the line of the road, materials of *earth, stone, timber*, and so forth, for the *construction* thereof.

The grant *for construction* authorized the taking and use of material *which was on the ground which would actually be occupied* by the road, or its extension, laterally, as well as the use of the ground itself in construction. The conferring of *right, power and authority* was with respect to taking material from *lands adjacent* to the line of road.

With all this particularity of statement, the true nature and full extent of the grant has not yet been stated. The act then makes a more complete and comprehensive statement of the grant and definition of the way granted, viz: "Said way is granted to said railroad to the ex- "tent of *two hundred feet* in width on each side "of said railroad where it may pass through the "*public domain.*" This is the first appearance of the words "*public domain*," as it is also the first designation of the width, or the method of measurement of the way. The grouping of the two designations in the same clause, viz: What

width it shall run, *through what* it shall run, would seem to indicate that it was intended to express something more comprehensive than could be declared or defined by the term *public lands.*

If we are to take the term public lands as descriptive of those lands which are in no manner reserved for any purpose, can we not accept the term public domain as including all of such lands, and in addition thereto all that are reserved in such a way, that Congress has still such power and control over them, that they can be devoted to a public use at any time, by authority of Congress, for the preservation of peace and promotion of the public welfare, if only at the time of such devotion or use, the fee has not already passed and vested in pursuance of the reservation? Why then may we not say that *public domain* is descriptive of not only uplands, but lands under water, which is always visible to the point where land is never visible except through the water?

It was not thought practicable to get from the lands covered with water the necessary materials of earth, stone and timber and the like, for the construction of the road, so the term public lands was used.

It was both practicable and feasable to build a railroad out over the water with materials obtained from the upland, therefore to cover what "*public lands,*" might not include "*public domain*"

was used. The grant is then concluded with a statement of what the *right of way through the public domain* includes, viz: "All necessary "ground for station buildings, workshops, depots, "machine shops, switches, side-tracks, turntables "and water stations."

It seems clear, therefore, that Congress intended to grant the way over tide lands, wherever in the construction of the line of the road in accordance with the provisions of the charter, the limits of the width specified might be found to include such lands.

This brings us to the consideration of a question which follows naturally.

THIRD.

DID CONGRESS HAVE POWER TO GRANT A RIGHT OF WAY OVER TIDE LANDS.

If what has been said about the public uses and purposes of the company's creation and existence, and concerning the nature and extent of the right of way granted to it, is true, this question must be answered in the affirmative.

But as the intention to grant without the power to grant cannot avail anything, this question is worthy of consideration.

The second subdivision of section 8 of the Constitution of the United States enumerates as one of the powers of Congress: "To regulate

"commerce with foreign nations, among the sev-
"eral states and with the Indian tribes." Following the specification of the several powers mentioned in the section, there is the general provision as follows: "To make all laws which "shall be necessary and proper for carrying into "execution the foregoing powers, and all other "powers vested by this constitution in the govern-"ment of the United States, or in any department "or officer thereof."

The constitution also, in connection with the provision for the admission of new states, provides as follows: "The Congress shall have "power to dispose of and make all needful rules "and regulations respecting the territory or other "property belonging to the United States."

In the case of *Gibson v. Choteau*, 13 *Wallace*, 99, the court said: "The power of Congress to "dispose of the public domain is subject to no "limitations; it cannot be interfered with or its "exercise embarrassed by any state legislation."

It was also held in the following cases, viz: *American Insurance Co. v. Canter*, 1 *Peters*, 542; *Brenner v. Porter*, 9 *How.*, 235; *Cross v. Harrison*, 16 *Howard*, 194, that "Congress has "the power to govern the territories of the United "States, and in so doing exercises the combined "powers of the national and state governments."

In the case of *Gibbons v. Ogden*, 9 *Wheaton*, 196, the court, in construing the provision giving

Congress power to regulate commerce, said: "This power, like all others vested in Con- "gress, is complete in itself, may be exercised to "its utmost extent, and acknowledges no limita- "tions other than are prescribed in the constitu- "tion."

In the following cases, viz: *Corfield v. Coryell*, 4 *Wash. C. C.*, 378; *Pennsylvania v. Wheeling & Bel. Bridge Co.*, 18 *How.*, 421; *Columbus Insurance Co. v. Peoria Bridge Co.*, 6 *McLean*, 70; *Columbus Insurance Co. v. Curtenius*, 6 *McLean*, 209; *Jolly v. Terre Haute Drawbridge Co.*, 6 *McLean*, 237; *United States v. Railroad Bridge Co.*, 6 *McLean*, 518, it was held that "Commerce "with foreign nations and among the several "states can mean nothing more than inter- "course with those nations and among those "states for the purposes of trade, be the object "of trade what it may; and this intercourse "must include all the means by which it can be "carried on, whether by the free navigation of "the waters of the several states, or by a *passage* "*overland* through the states, where such pas- "sage becomes necessary to the commercial in- "tercourse between the states."

Under this provision of the constitution, Congress has power over navigable streams for the regulation of commerce and the establishing of post roads, and has power to authorize the destruction of the navigability of a navigable stream within a state for purposes connected with commerce and post roads, but not unless neces-

sary, or where unconnected with commerce and post roads.

Mining Debris Case, 9 *Sawyer*, 441.

We have already seen that the Northern Pacific Railroad was not only made a postal route, but a "Military Road subject to the use "of the United States., for postal, military, naval "and *all other government service*, and also sub- "ject to such regulations as Congress may impose "*restricting charges* for such government trans- "portation."

If Congress has power to authorize the construction of a bridge across a navigable stream within the state, it can certainly authorize a railroad company, whose road is subject to any and all government service at rates fixed by the government itself, to build out far enough into navigable water within the state to carry out the purpose of the government service, or to be in readiness to do so when called upon, provided the projection from the land does not extend far enough into the water to obstruct navigation. The piers and supports of the bridge form a certain amount of obstruction to navigation, and are placed not only on the tide lands or lands under the water, but out in the depths where the waters come and go without ever revealing the land beneath. It is true that the state may authorize the occupation by bridge across the water, or by projection out from the land, provided Congress has not taken any steps to do so.

That is "Generally in respect to commercial "matters which are local and limited in their scope, "not requiring national and uniform regulations, "the states may regulate them until Congress in- "terferes. But as soon as Congress acts, the "state is excluded." See decision in case of *Gloucester Ferry Co. v. Pennsylvania*, 114 *U. S.*, 196; also, in *Brown v. Huston*, 114 *U. S.*, 622. Here Congress has acted with reference to the Northern Pacific Railroad, one of its agencies in the regulation of commerce; the commercial matter involved is neither local or limited, but requires national and uniform regulations beyond the power of any one state to establish or maintain If the state is powerless to accomplish this, she is not authorized to do anything which is inconsistent with the operations authorized by Congress for that purpose, nor can she be allowed to interfere with the exercise of the powers of Congress, whether their execution is being directed by the General Government itself, or through a special creation of Congress brought into being and clothed with authority for that purpose.

The state cannot, by any legislation, or by the assertion of any claim, preclude Congress from the establishment and conduct of the operations authorized by the constitutional power granted to Congress.

There is no question but what Congress can confer upon any concern, whether one created by it or not, the authority to exercise the

power, notwithstanding the protest of the state.

In the case of *Decker v. Baltimore & N. Y. R. Co.*, 30 *F. R.*, 723, Judge Wallace in the United States Circuit Court for the Southern District of New York, held, that "Congress "could lawfully confer upon a private corporation "the capacity to occupy navigable waters within "a state and appropriate the soil under them up- "on acquiring the rights of the owners, in order "to construct a bridge over such waters for "the purposes of interstate commerce, without "the consent, and notwithstanding the protest of "the state."

The question for decision in that case was whether the B. & N. Y. R. Co., had a legal right to build a bridge across the navigable water-way known as "Arthur Kill," forming one of the boundaries between the states of New York and New Jersey.

The Legislature of New Jersey, by an act passed April 6, 1886, had forbidden the erection of any bridge or structure over any part of the navigable waters where the tide ebbs and flows, separating the state from other states, without express permission given by the legislature by statute in that behalf.

Subsequently Congress passed an act, June 16, 1886, entitled, "An Act to authorize the con- "struction of a bridge across the Staten Island

" Sound, known as Arthur Kill, and to establish " the same as a post road."

The B. &. N. Y. R. Co. proposed to build a bridge across this waterway under claim of authority conferred by this act. The New Jersey act was passed after the introduction of the bill in congress, but before it became a law, and was preceded by the adoption of concurrent resolutions of the senate and house of assembly of New Jersey, protesting against any action on the part of Congress intended to legalize the erection of such a bridge.

The court said among other things the following: " Although the act of congress estab- " lishes the bridge, when constructed, as a post " road, this is wholly an incidental and an un- " necessary feature of the legislation. The act " does not purport to authorize the bridge in or- " der to provide an additional post road; and the " provision establishing the bridge as a post road, " when built, was unnecessary, because it would " become such by force of pre-existing law, " Section 3964, Rev. St. U. S. Neither does it " in terms purport to be an exercise of the power " to regulate commerce between states but that " this is its essential character is apparent from " the recitals which show that it was designed to " afford a connection between railroads already " constructed on opposite sides of the Sound. " Obviously congress intended to plant the rights " conferred on the defendants upon the validity

" of the act as a regulation of commerce. Both " the language and the history of the act pre- " clude the doubt whether it can be construed " as intended to grant a privilege which is to be- " come operative when concurrent authority to " build the bridge is obtained from the States of " New Jersey and New York, it is silent as to " any such condition, and this silence is emphatic, " in view of the provisions contemplating the " assent of the state which have been inserted " in all previous acts of a similar character when " permission by the state had not been given " in advance. As it was passed notwithstand- " ing the protest of New Jersey, which was in " effect a declaration that she would not con- " sent, it must be assumed that congress did " not regard the consent of the state necessary."

In the language of the Supreme Court of the United States in *Miller v. Mayor of New York*, 109 *U. S.*, 395.

" The power vested in congress to regulate " commerce with foreign nations and among the " several states, included the control of the " navigable waters of the United States, so far " as may be necessary to insure their free navi- " gation; and by navigable waters of the " United States are meant such as are navigable " in fact, and which by themselves, or by their " connection with other waters, form a continu- " ous channel for commerce with foreign coun- " tries or among the states."

Judge Wallace then proceeds to say; "Whether the waters *are wholly within* the "boundaries of a state, or, as here, lie *between two* "*states*, is *immaterial*. They are navigable waters "of the United States, if they *form by themselves*, "or by *uniting with others*, a *continuous* highway "for commerce with other states or countries. "*The Daniel Ball*, 10 *Wall.*, 557; *Escanaba Co.* "*v. Chicago*, 107 *U. S.*, 682. The power of "control over such waters necessarily includes "the power of *deciding what structures are im-* "*pediments* to *commerce*, and by an *unbroken* line "of decisions it is settled that the *paramount* "authority regulating bridges that affect the "navigation of the navigable waters of the "United States *is in Congress.*

"So long as this authority lies dormant, the "states may authorize the erection of bridges over "navigable waters within their limits, which may "to some extent obstruct navigation, or by con- "current action may bridge the waters lying be- "tween them, but *so soon* as Congress *intervenes* "and *exercises* its powers of regulation, what has "been done by state authority *must give way* to "the *paramount authority* of Congress. The "power of the state ends where that of the "nation begins. *Wilson v. Black Bird Creek* "*Marsh Co.*, 2 *Peters*, 250; *Wheeling Bridge* "*Case*, 18 *How.*, 421; *Gilman v. City of Phila-* "*delphia*, 3 *Wall.*, 728; *County of Mobile v. Kim-* "*ball*, 102 *U. S.*, 691; *Pound v. Turck*, 95 *U. S.*, "459.

"These decisions, however, fall short of adjudicating the present case, because they do not decide in terms that the power of regulation extends further than is required to preserve the free and unobstructed navigation of the public waters. If the power ends there, the present act is nugatory. That it does end there never has been authoritatively determined.

"Expressions of opinion by learned jurists are found in several adjudged cases, to the effect that Congress cannot, under the power of regulating commerce, authorize the erection of bridges over navigable waters without the consent of the state, or sanction an obstruction of commerce."

Judge Wallace then proceeds to quote from the opinions of several of these jurists, viz.:

From the opinion of Chief Justice Savage in *People v. Rensselaer & S. R. R. Co.*, 15 *Wend.*, 113;

From the opinion of Earl, J., in *People v. Kelly*, 76 *N. Y.*, 475;

From the opinion of Justice McLean, in *Wheeling Bridge Case*, 18 *Howard*, 421;

From the opinion of Justice Field, in case of *Bridge Co., v. U. S.*, 105 *U. S.*, 496,

and concerning them Judge Wallace says: "It is to be remarked, however, of these observa-

"tions, that what was said by Mr. Chief Justice "Savage in the first case, and by Mr. Justice "Earl in the second, was *obiter*, and that the "views expressed by Mr. Justice McLean and "Mr. Justice Field were by way of *argument* in "*dissenting* from the opinion of the court. It "was *not necessary* in either of those cases to *pass* "*upon the point* suggested."

He then refers to authorities opposed to those opinions as follows; "The case of *South Caro-* "*lina v. Georgia*, *93 U. S.*, *4*, is an authority the "other way. The Supreme Court there consid- "ered a case in which a bill was filed by the State "of South Carolina against the Secretary of War "and other officers of the United States, to re- "strain them from obstructing or interrupting the "navigation of the Savannah River, under au- "thority of an appropriation Act of Congress for "the improvement of the harbor at Savannah. "The court were of the opinion that the acts "sought to be restrained did not tend to the de- "struction of the navigation of the river, although "by obstructing the water-way of one of its chan- "nels, navigation would be restricted to the other "channel, and therefore were not in any just or "legal sense a destruction or impediment of navi- "gation. The Court held that the appropriation "act conferred upon the *Secretary of War* the *dis-* "*cretion* to *determine* the *mode* of *improvement*, "and authorized the diversion of the water from "one channel into another *if*, in *his judgment*, "such was the *best mode*. Mr. Justice Strong, "speaking for the Court, used this language: 'It

'is *not*, however, to be *conceded* that Congress has
'*no* power to order obstructions to be placed in
'the navigable waters of the United States, either
'to assist navigation or to change its direction by
'forcing it into one channel of a river rather than
'the other. It may build light houses in the bed
'of the stream. It may construct jetties. It may
'require all navigators to pass along a prescribed
'channel, and may close any other channel for
'their passage. If, as we have said, the United
'States have *succeeded* to the *power* and *rights*
'of the several states, so far as the *control* over
'*interstate* and *foreign commerce* is concerned,
'this is not to be doubted'."

Judge Wallace further says: "And the Wheel-
" ing Bridge case was cited as ruling that the pow-
" er of Congress to regulate commerce *includes*
" the *power* to *determine* what shall or shall not be
" *deemed*, in the *judgment* of *the law*, an obstruc-
" tion of navigation." This decision controls the present case. The State of South Carolina had not consented to the closing of one of the channels of her river by the authorities of the United States, and insisting that this could not be done against her consent, had asserted her rights to prevent it by a bill in equity.

The question was necessarily involved whether, under the power to regulate commerce, Congress *can close* the *channel* of a river within a State *against* the *consent* of the State. The decision puts that question at rest, and is an *unqualified affirmation* that *Congress* can do so.

If Congress can close a river, it can certainly

bridge one. Applying the principle of that decision here, where instead of a jetty or a light house, a bridge is the structure authorized, it follows that what Congress has sanctioned by the present act is not an obstruction of navigation, that the *judgment of Congress concludes controversy* as to the fact, and that concurrent action on the part of New Jersey is not only not indispensable, but her opposition is futile.

The argument that the rights of the State of New Jersey are ignored or invaded by permitting such a bridge to be built without her consent is purely a sentimental one. She has no control of the waterway for the purposes of navigation which is not *subordinate* to the *will* of Congress. She can make no use of it *against* the *will* of Congress.

If the constitutional power of Congress over the navigable waters of the United States is confined to a mere negation of State authority over them, if Congress can only ratify and prohibit what the State proposes, if it has no *faculty* of *independent* action and no *vigor* to *originate*, then instead of being *paramount*, the power is practically subordinate to the power of the State. Yet it has never been doubted that, within the scope of its powers, the government of the United States is *supreme*, or that its authority when asserted, is, to the extent asserted, of necessity exclusive.

The constitution delegates to Congress the *power* to *prescribe* the *conditions* upon which

commerce in *all* its *forms* shall be conducted between the citizens of the several States and to adopt *measures* to *promote* its *development* and prosperity. Bridges over navigable waters are necessary to facilitate transportation and commercial intercourse. They are well recognized instrumentalities of commerce. The power to build them or authorize them to be built is an *incident* of the *general power* to *regulate* interstate commerce. If the national and state authorities disagree as to the expediency of bridging a river, and if, as is asserted, the power to act is partitioned between them, and can only be exercised concurrently, interstate commerce may be crippled. If Congress *deems* a railroad bridge necessary or useful as an instrumentality of interstate commerce, there is no sound reason, aside from considerations of expediency, why it should not build one, or authorize a private corporation to do so. It seems idle to say that its power only extends to prohibiting the states from building such bridges, and that it can direct what bridges shall not be built, but not what shall be built. This would make the constitutional prerogative obstructive merely. Thus circumscribed it would be shorn of most of its value.

In another case involving a bridge across this same waterway, Judge Wallace referred to his former ruling as having settled the matter beyond controversy in that court.

See case of *P. R. R. Co. v. B. & N., R. Co.*, 37 *F. R.*, 129.

This matter again came up in relation to this same waterway in the case of *Stockton, Attorney General, v. the B. & N.Y. R. Co.*, 32 *F.R.*, 9. In this case the State of New Jersey sought to enjoin the railroad company from erecting a bridge or viaduct across the *Arthur Kill* on the ground that it was being constructed across the lands of the state lying under the waters of the Arthur Kill.

Justice Bradley of the Supreme Court of the United States in rendering opinion in the case said: "The fifth amendment of the United States "constitution provides only that private property "shall not be taken without compensation, mak- "ing no reference to public property.

"But if the phrase may have an application "broad enough to include all property and owner- "ship, the question would still arise whether the "appropriation of a few square feet of the river "bottom to the foundation of a bridge which is "to be used for the *transportation* of an *extensive* "*commerce* in *aid* and *relief* of that *afforded* by "the *waterway* is at all a diversion of the prop- "erty from its original use.

"It is not so considered when sea walls, piers, "wing dams, and other structures are erected for "the purpose of aiding commerce by improving "and preserving the navigation. Why should it "be deemed such, when, (without injury to the "navigation) erections are made for the *purpose* "of *enlarging commerce beyond* the *capacity* of the

" *navigable stream itself*, and of all of the naviga-
" ble waters of the country.

" *It is commerce* and *not navigation* which is
" the *great object* of *constitutional care.*

" If it is necessary that the United States
" Government should have an eminent domain
" still higher than that of the state, in order
" that it may fully carry out the objects and pur-
" poses of the constitution, then it has it. What-
" ever may be the necessities or conclusions of
" theoretical law as to eminent domain or any-
" thing else, it must be received as a postulate
" of the constitution, that the government of
" the United States is invested with full and
" complete power to execute and carry out its
" purposes, and as one of these purposes is the
" regulation of commerce among the several
" states, and as that involves the needs and
" ways of intercommunication, it follows that
" congress may provide for these necessities
" whether the states co-operate or not.

" It is contended that, although congress may
" have power to construct roads and other
" means of communication between the states,
" yet this can only be done with the concurrence
" and consent of the states in which the struc-
" tures are made. We do not concur in this
" view. We think that the power of congress
" is supreme over the whole subject, unimpeded
" and unembarrassed by state lines or state
" laws; that in this matter the country is one

" and the work to be accomplished is national,
" and that state inierests, state jealousies, and
" state prejudices do not require to be consulted.
" In matters of foreign and interstate commerce
" there are no states."

In the case of *Hughes v. The Northern Pacific Railroad Company*, 18 *F.R.*, 106, Judge Deady quoted a portion of what Judge Sawyer had previously said in the case of *Hatch v. Willamette Iron Bridge Co.*, 7 *Sawyer*, 132, as follows: "The power to authorize the erection of a bridge
" over a navigable water of a state for the conven-
" ience of the inhabitants thereof belonges to
" the state as a part of its general police power.
" Congress does not possess this power directly
" *eo nomine*, but its control over the navigable
" waters of the state as a means of commerce
" gives it a practical veto upon the power of the
" state in this respect. Therefore no state can
" authorize or maintain the erection of a bridge
" over a navigable water, which in effect contra-
" venes or conflicts with a law of Congress con-
" cerning the same. And the fact that such
" water is wholly within the state is immaterial,
" if it is accessible from another state, or forms
" part of a highway between itself and other
" states."

Then, in that connection, Judge Deady says: " But this is not to be understood as denying
" the right of Congress to bridge or authorize
" the bridging of navigable waters, under its
" constitutional power, 'to establish post offices

" 'and post roads,' or make war or provide for " the common defense," Citing *Wheeling Bridge case*, 18 *How.*, 431.

The case in which Judge Deady was rendering the opinion referred to was one involving the question of the right of the Northern Pacific Railroad Company to build a railroad bridge across the Willamette river at Portland.

The Court says: "There is no express per- "mission or authority in the charter of the "Northern Pacific for bridging a navigable "water on the line of its road, and the act of the "state goes no further than to consent that it "may bridge the river if authorized thereto by "Congress."

In speaking of the company being authorized to construct its main line to Portland and to extend the same from there to Tacoma, the Judge says: "To accomplish this the river must be "crossed at or near this point, either by a bridge "or a ferry, and this must have been known to "Congress. Under the authority to construct "its road to Portland, the right of the company "to cross the river by a ferry or a bridge, so "high above the stream as in no way to inter- "fere with its navigation, will be readily con- "ceded."

"The power to construct and operate its road "to and from Portland is given in express terms; "and undoubtedly it may erect a bridge as a

"part of said road, that does not interfere with "the navigation of the river."

In this connection, reference is made to the language of the judge in speaking of the requirements contained in the 5th section of the company's charter, relative to the construction of the road, with all the necessary draws, culverts, bridges, viaducts, etc.

The judge first intimates that the purpose of the requirement was to lay or place upon the company a rule or standard of conduct, in the construction and equipment of the road, rather than to confer upon it power to build draw bridges over navigable waters. The judge reaches the conclusion that the company had the power to build draw bridges over navigable streams where necessary, regardless of the use of the terms "bridges" and "draws" in the 5th section, construing the term "necessary" as used in connection with the other terms just mentioned, the Judge says: "What "effect is to be given to the word 'necessary' in "this section, and who is to be judge of what is "necessary to the construction and equipment of "the road in the manner therein contemplated, "may also be a question.

"For the purpose of entitling the defendant to "a patent for the lands coterminus with the com- "pleted sections of the road, it is probably enough "that it is so constructed with such 'draws, cul- "verts and bridges,' as the commissioners ap-

" pointed to examine the same, under section 4
" of the act, may deem sufficient.

" But the judgment of these commissioners in
" this respect cannot have the effect to limit or
" restrain the right of the defendant to construct
" or provide additional or more costly and con-
" venient draws and bridges, or other means of
" maintaining and operating its road as a first
" class one. Whatever, in the judgment of the
" commissioners is required to bring the road up
" to the standard prescribed by sections of the
" act, is 'necessary' to be done before the de-
" fendant is entitled to the land devoted by Con-
" gress to its construction.

" But in crossing a navigable water on the line
" of its road the company is not limited to the
" use of such means only as are absolutely neces-
" sary. Within certain limits it may use those
" which it thinks most convenient. A ferry may
" be all that is absolutely necessary for the trans-
" portation of passengers and freight, or even
" trains. But the company may prefer, and
" the exigencies of its business may require
" the more safe and expeditious, though costly
" method of a bridge. As was said, the power
" to bridge this river was not given by the act to
" this defendant in express terms. Neither is
" the power so given to cross it at all, There-
" fore, unless it appears by a clear and necessary
" implication from what is expressly provided,
" that it was the intention of Congress to author-
" ize it to cross the river by means of a draw-
" bridge, or at all, the attempt to do so is unlaw-

" ful. The power to 'lay out, locate, construct,
" 'furnish, maintain and enjoy a continuous rail-
" 'road' from Lake Superior to Portland, 'with
" 'all the powers, privileges and immunities
" 'necessary' to that end, is expressly conferred
" upon the company.

" Portland cannot be reached from Lake Su-
" perior, or any point on the line between here
" and there, without crossing the Willamette
" river. The right to cross it is, then, clearly
" implied in the express authority to construct a
" 'continuous' line of railway from a point to
" the eastward of it to a town on its western
" bank. Argument cannot make the proposition
" plainer than the mere statement of it. The
" express power to construct the road cannot be
" exercised without the implied power of cross-
" ing the river in some way. But by what
" means may this crossing be effected? Only
" two methods are known or suggested—a ferry
" or bridge. The former may be sufficient to enti-
" tle the company to the land grant, but where
" the construction of a bridge is practicable, I
" think a ferry is considered an inferior method
" of prolonging a railway across a stream. If
" the river was not navigable it would be abso-
" lutely necessary to bridge it. And if, being
" navigable, the defendant is not authorized to
" do so, it must be, not from want of power to
" build a bridge, but from want of authority in so
" doing to obstruct or impair the navigability of
" the stream." In *U. P. R. Co. v. Hall*, 91

U. S., 343, it was held that the bridge across the Missouri river between Omaha in Nebraska, and Council Bluffs in Iowa, is a part of the line of the Union Pacific Railway, and that the company was, therefore, authorized to construct it, under section 14 of the act of July 1st, 1862, which simply provided for the construction of a line of railway by that company "from a point on the "western boundary of the state of Iowa" to the 100th meridian west of Greenwich. The company claimed the bridge was built under provivisions of a subsequent amendatory act of July 2d, 1864, which authorized its construction.

In delivering the opinion of the Court in the case, Mr. Justice Strong said: "From that act "(July 1st, 1862) alone we have deduced the "conclusion that the company was authorized "and required to build their railway to the Iowa "shore. That authority included within itself "power to build a bridge over the Missouri. No "express grant to bridge the river was needed. "Whatever bridges were necessary on their line "were as fully authorized as the line itself, and "the company were as much empowered to build "one across the Missouri as they were across the "Platte, or any other river intersecting the line "of their road."

Further, as to the power of Congress, attention is called to *Hawkins Point Light House case*, 39 *F. R.*, 77.

This was a case in ejectment for the site of a

light house in Patapsco river, erected by the United States as a necessary aid to navigation. The plaintiff's case was that he held a grant from the state of Maryland of the submerged soil upon which the structure stood, and that it had not been condemned nor any compensation paid or tendered for it, and that he had also, as riparian owner of the neighboring shore, the right to improve out into the river over the light house site.

The court held that the private interest in the submerged soil at the bottom of the river which had been granted to the plaintiff was subject to the paramount right of the public to use the river for navigation, and of the United States in the regulation of commerce, to erect thereon such aids to navigation as were reasonably necessary ; and that the plaintiff's right to improve out into the river, until actually availed of, was subject to the right of the United States to use the soil under the water in aid of navigation without the plaintiff's consent and without compensation.

Held also that the United States in constructing, by authority of Congress, a necessary light house upon soil under the water of the river, was exercising a right in aid of the public right of navigation to which the plaintiff's private ownership in the submerged soil was necessarily subservient, and that by such use the United States was not taking private property, within the meaning of the fifth amendment of the federal constitution.

See also pages 81 and 83 of the same authority for citation of important cases.

Another case of this kind was *Hill v. United States*, 39 *F. R.*, 172.

In the year 1862, the state of Maryland granted by statute to the owner of all lands bounding on the navigable waters of the state, the lands of the state covered by water in front of such shores to the deep-water or channel of the navigable waters.

The United States in 1874, for the purpose of the proper navigation of Chesapeake Bay, erected on the lands covered by water of the bay and within two hundred yards of plaintiff's island a light house.

The plaintiff claimed compensation as owner of the adjoining shore. The Court in denying him relief said: "It is true that after the author-
"ity of Great Britain had been overthrown by
"the States, all the property belonged to the
"state. But the State of Maryland, when she
"ratified the constitution of the United States
"and became a member of the Federal Union,
"held the lands under her navigable waters
"subject to the conditions of that instrument.
"The constitution provides that Congress shall
"have power to regulate commerce between the
"states and with foreign nations, and it has
"long been held that the power to regulate
"commerce carries with it the power to build

" light houses and do all other necessary things " without which commerce cannot be successfully " carried on. When the State of Maryland " yielded this power to the United States she held " the lands beneath the navigable waters *sub* " *modo* only. They are subject to the right of " the United States to use them in the regula- " tion of commerce, as much so as the navigable " waters themselves are under control of the " Federal Government, upon which she may fix " a light boat certainly, and anchor it perma- " nently to the bottom."

When, therefore, the State granted the riparian privileges mentioned in the statute referred to, she could grant no more than she possessed, and the plaintiff holds them subject to the right of the United States to regulate commerce as the State did. This light house is, in the determination of Congress, necessary for the commerce or navigation of the Chesapeake, was within their power to build ever since the adoption of the Federal Constitution, and the plaintiff has no claim for the use and occupation of the premises.

In the case of *Tex. & Pac. R. W. v. City of New Orleans*, 40 *F. R.*, 114, the Court says: " The Mississippi River is one of the principal " navigable streams in the United States, and as " such is within the exclusive control of the " Congress of the United States, and such being " the case, neither the City of New Orleans nor " the State of Louisiana can authorize any ob-

" struction that will interfere with its naviga-
" tion.

" In aid of navigation and commerce, Congress
" authorizes cities and towns and other corpor-
" ate bodies and sometimes individuals to erect
" and maintain levees and warehouses, etc., on
" the banks of navigable streams, under such re-
" strictions as will not hinder or delay the navi-
" gation on such waters.

" But this power is vested in Congress, the
" law making power, and not in the courts, the
" judicial department of the Government."

In the case of *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 *F. R.*, 778–9, it was said: " Congress may in its wisdom obstruct or per-
" haps destroy navigation, to a limited extent,
" at particular points, for the purpose of its gen-
" eral advantage and improvement on a larger
" general scale, such as by authorizing the build-
" ing of a railroad or post road bridge across a
" navigable stream."

In the case of *The City of Mobile v. Eslava*, 16 *Pet.*, 252, it was said: " That the United
" States acquired the title to lands flowed by
" the tides by the treaty with Spain, is of course
" admitted. That they had power to grant, up
" to the adoption of the Constitution of Ala-
" bama in 1819, is also admitted. That the
" Spanish King could grant lands under tide
" waters, is free from doubt, and the United

" States acquired by cession all his powers over the vacant soil."

It was also said in that connection, that, " whilst territories, the people inhabiting the " countries now composing the new states, were " subject to the will of Congress, unrestrained " further than restrictions were imposed by the " Federal Constitution, and by compact, where " the lands had been ceded by an original state, " or by treaty, when acquired by a foreign " nation. The power of Congress was, and now " is, in the Territories, almost absolute."

Id., 256–7–8–9. See also 255–6.

In *Van Brocklin v. Tenn.*, 117 *U. S.*, 168, the U. S. Supreme Court says: " Public and unoccu- " pied lands, to which the United States, have " acquired title, either by deeds of session from " other states, or by treaty with a foreign coun- " try, Congress, under the power conferred upon " it by the constitution, 'to dispose of and make " 'all needful rules respecting the territory or " 'other property of the United States,' has the " exclusive right to control and dispose of, as it " has with the property of the United States, " and no state can interfere with this right or " embarrass its exercise."

It is a well known fact that grants of lots between high and low tide, made by Act of Congress, have been confirmed.

Pollard's Heirs v. Kibbe, 14 *Peters*, 352.

In a case in 1 Howard, 102, there is found the following declaration by the court: "That the "United States had the undoubted title (to "lands under tide waters) before the adoption of "the constitution of Alabama, has never been de- "nied by anyone."

In the case of *Dooltittle v. Kibbe*, 9 *Howard*, 471, it is said: "By the admission of the state "of Alabama into the union, that state became "invested with the sovereignty and dominion "over the shores of navigable rivers between "high and low water mark. Consequently "*after* such admission congress could make no "grant of land thus situated."

It would seem from the use of the word "after" that the court intended to preclude the idea that there could be any lack of, or restraint upon, the power of disposition, or control by Congress during the period prior to the admission of the state.

It has been judicially determined that the land including the beds and shores of navigable waters below ordinary high tide, belonged, prior to the admission of the state into the union, to the United States as proprietor and was subject to its jurisdiction as sovereign. Upon the admission of the state into the Union such beds and shores not otherwise disposed of by the United States, became the property of the state in its sovereign capacity.

The cases holding to this doctrine are found reported as follows :

Shiorley v. Welch, 20 *F. R.*, 28.
Pollard's Lessee v. Hogan, 3 *How.*, 228.
Barney v. Keokuk, 94 *U. S.*, 336.
See also 9 *Oregon*, 504.

The power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all of the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the Union and subject to all the requisite legislation by Congress. (See 3 *Wall.*, 72, 726 ; 3 *How.*, 230.)

In the territories the national government is both the sovereign and proprietor. Congress has the power to govern and in so doing exercises the combined power of the national and state governments. (1 Peters, 542.) *McAllister v. United States*, 141 *U. S.*, 180 *et seq.*

And as such sovereign and proprietor it may dispose absolutely of all the public lands in the territory, whether high or low, wet or dry.

The shores of lands in Oregon periodically covered by the tides and ***not disposed of by the United States while it was a territory***, are the property of the state. 39 F. R., 733.

The character of the title of the state to the

bottom of the navigable rivers as against the United States, when taken or granted by the United States for the purpose of commerce or navigation, was considered in the United States Circuit Court and held that it was not private property, and that the title of the state was in trust for the purposes of commerce and navigation, and that the United States had the right, under the commerce clause of the constitution, to take it or grant it for this purpose.

Stockton v. B. & N. Y. R. Co., 32 *F. R.*, 19.

Upon the authorities, we feel no hesitancy in saying that Congress had the power to make to such a corporation as the Northern Pacific Railroad Company was and is, and for the purposes specified in the charter of that Company, a grant of right of way for said Company's railroad over the tide lands in the harbor of Tacoma; that Congress would have the power to make this grant to such a Company and for such a purpose even if it were made at a time subsequent to the admission of the State, and that in pursuance of its constitutional power to regulate commerce among the several states; but as this particular grant was made during the time that Washington was a territory, Congress at that time had not only the power of control but a power of disposition independent of its power to regulate commerce.

The authority given to the Company by the

Act of Congress was for the construction of a line of railroad from Lake Superior to Puget Sound. Congress fully intended when it passed that Act that the road should be constructed to *Puget Sound* and not to some interior approach to that sound where it should be left to the mercies of some independent local or State organization to enable it to do business at that portion of Puget Sound where was and is available navigation suited to all ordinary purposes of commerce. The intention was that the road should be built to the point on Puget Sound where the Company could subserve the purposes of its creation. The road was to be built down to deep water navigation, instead of waiting back on the tide flats until the state might, in twenty years from now, dig a trench up to it. The authority was not merely to construct a railroad to Tacoma, or to Commencement Bay, but to Puget Sound, and it did not reach Puget Sound until it struck not merely the tide waters, but the navigable waters of that body.

It having been shown that congress had the power, and still has the power to make such a grant, and that the grant was made by congress, it is such an one as cannot be interfered with, taken away, or in any way lessened or curtailed by any act of the state, either through its constitution or legislature.

Justice Field, in rendering decision in the case of *Railroad Company v. Baldwin*, already referred to, said: "Where congress has conferred

"upon the railroad corporation of a state, a right "of way over the public lands of the United "States, in any one of their territories, it may "be doubted whether the state subsequently cre- "ated out of the territory could prevent the en- "joyment of such corporation of the right con- "ferred. It could do so only on the same terms "that it could refuse a recognition of its own "previously granted right. For in such matters "the state would succeed only to the authority of "Congress over the territory." 103 *U. S.*, 426.

FOURTH.

IF THE STATE HAD ANY INTEREST IN THE TIDE-LANDS OVER WHICH THE ROAD WAS AND IS CONSTRUCTED, IT HAS LOST THE SAME BY A DISCLAIMER.

Sec. 2 of art. XVII. of the state constitution disclaims all "title and claim to all tide, swamp "and overflowed lands patented by the United "States, provided the same is not impeached for "fraud."

The term "patented" as here used means a conveyance and any conveyance that will have the effect of transferring title. Now a grant made by law is the highest order of conveyance, because it has the most authentic source and is least liable to attack. It is not only a law but a contract executed.

See *N. P. R. R. Co. v. Majors*, 5 *Montana*, 111 and 126.

Citing following cases:

Fletcher vs. Peck, 6 Cr. 87.
Strother vs. Lucas, 12 Pet., 454.
9 Cr. 43.
Wilkinson vs. Leland, 2 Pet. 498.
3 Wash. Real Pro., 4th Ed., 193, 194.
N. P. R. R. Co., vs. Lilly, 6 Mont. 65.

That the grant or right of way to the Northern Pacific Railroad Company is equivalent to, if not of higher authority than a patent is evident from the fact that no provision was made for the issuance of any patent by the Government for any lands included within the right of way, or for the right of way itself. Evidently Congress did not deem it necessary, and certainly enough has been said on the subject by the Supreme Court of the United States to satisfy us that that very distinguished body considered the Act itself all the conveyance that was necessary.

Then the right of way, and all the lands included therein having been patented to the Company before the admission of the State, the disclaimer of the State attaches, and we are entitled to claim and urge all the benefits of the same against the disclaiming party, the State.

In concluding this brief, we have to say that we have not discussed herein all the incidental questions which were presented on the two occasions when oral argument was made before you on this subject, but we have only endeavored to outline sufficiently the principal questions

involved, trusting that they will enable you to recall all of what was said in oral argument that is worthy your attention.

Olympia, Wash., November 14th, 1891.

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